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THE ADMINISTRATION OF JUSTICE AND THE HUMAN RIGHTS OF DETAINEES: QUESTION OF HUMAN RIGHTS AND STATES OF EMERGENCY

Fourth annual report and list of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, presented by Mr. Leandro Despouy, Special Rapporteur appointed pursuant to Economic and Social Council resolution 1985/37

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INTRODUCTION

1. By resolution 10 (XXX) of 31 August 1977, the Sub-Commission on Prevention of Discrimination and Protection of Minorities expressed its concern at the manner in which certain countries applied the provisions relating to situations known as states of siege or emergency. Convinced that a connection existed between such application and the situation regarding human rights in the said countries, it considered that a comprehensive study of the implications for human rights of recent developments in that sphere would be conducive to the achievement of the aims pursued by the United Nations in the field of human rights. The comprehensive study was presented by Ms. Nicole Questiaux at the thirty-fifth session of the Sub-Commission (E/CN.4/Sub.2/1982/15).

2. In resolution 1983/18, the Commission on Human Rights requested the Sub-Commission to propose for the Commission's consideration measures designed to ensure the respect throughout the world of human rights and fundamental freedoms in situations where states of siege or emergency existed, especially respect for those rights referred to in article 4, paragraph 2, of the International Covenant on Civil and Political Rights.

3. By resolution 1983/30, the Sub-Commission decided to include in its agenda an item entitled "Implementation of the right of derogation provided for under article 4 of the International Covenant on Civil and Political Rights and violations of human rights." 1/

4. At the Sub-Commission's request, the Economic and Social Council, by resolution 1985/37, authorized the Sub-Commission to appoint a special rapporteur to carry out the work referred to in Commission resolution 1983/18 and Sub-Commission resolution 1983/30.

5. The mandate of the Special Rapporteur for that task, Mr. Leandro Despouy, as laid down in these resolutions as well as in subsequent Sub-Commission resolutions 1985/32, 1987/25, 1988/24, 1989/28 and 1990/19, includes the following main tasks: (a) to draw up and update annually a list of countries which proclaim or terminate a state of emergency; (b) to examine, in annual reports, questions of compliance by States with internal and international rules guaranteeing the legality of the introduction of a state of emergency; (c) to study the impact of emergency measures on human rights; (d) to recommend concrete measures with a view to guaranteeing respect for human rights in situations of state of siege or emergency.

6. The Special Rapporteur has presented to the Sub-Commission and to the Commission on Human Rights an explanatory paper (E/CN.4/Sub.2/1985/19) and his first, second and third reports and lists of States which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency, including the revised and updated versions of those reports (E/CN.4/Sub.2/1987/19/Rev.1 and Add.1-2; E/CN.4/Sub.2/1988/18/Rev.1; E/CN.4/Sub.2/1989/30/Rev.2).

7. By its decision 1991/262, the Economic and Social Council, noting Commission on Human Rights decision 1991/108 and Sub-Commission resolution 1990/19, endorsed the request by the Sub-Commission to Mr. Leandro Despouy, Special Rapporteur on human rights and states of emergency, to continue to update the list on states of emergency and to present in his annual report to the Sub-Commission and the Commission on Human Rights draft standard provisions on emergency situations.

8. The present report has been prepared in pursuance of this decision, as well as of other pertinent resolutions of the Commission on Human Rights and the Sub-Commission.

I. LIST OF STATES WHICH, SINCE 1 JANUARY 1985, HAVE PROCLAIMED, EXTENDED OR TERMINATED A STATE OF EMERGENCY

9. By drawing up this list of States which have proclaimed, extended or terminated a state of emergency, the Special Rapporteur has endeavoured, within the limits of the information available to him, to give the Sub-Commission and the Commission as complete a picture as possible of the world situation regarding states of emergency since 1 January 1985. The present composite list contains a summary of information which had already been included in his three previous reports as well as new information received from Governments, United Nations bodies and other intergovernmental organizations, communicated by non-governmental organizations in consultative status with the Economic and Social Council and published in the press since December 1990, when his third revised report was issued.

10. The purpose of this recapitulation is to give an overall view of the world situation regarding states of emergency and at the same time to improve the list prepared by the Special Rapporteur. To that end, it is essential to benefit once more from the cooperation of the Governments concerned, the non-governmental organizations and all those in a position to supply reliable information capable of correcting errors or remedying gaps which may exist in that list.

11. According to the information available to the Special Rapporteur, the following 61 States have, since 1 January 1985, taken measures which constituted the proclamation, extension, maintenance or termination of emergency regimes in various forms:

Afghanistan: State of emergency proclaimed on 19 February 1989. Lifted on 28 May 1990.

Sources: Interim reports on the situation of human rights in Afghanistan, prepared by Mr. F. Ermacora, Special Rapporteur of the Commission on Human Rights (documents A/44/669, para. 20 (e), and A/45/664, para. 36).

Algeria:* State of siege proclaimed on 6 October 1988. Terminated on 12 October 1988.

Sources: Letter from the Government dated 28 April 1989.

(Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

State of siege decreed on 5 June 1991 for a period of four months.

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* An asterisk accompanying the name of a country or a territory indicates that the state of emergency there is still in force.

Still in force.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Argentina: State of siege proclaimed on 25 October 1985 for 60 days. Terminated on 7 December 1985.

Sources: Letter from the Government dated 12 August 1987. (First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27).

State of siege proclaimed on 29 May 1989 for 30 days. Lifted on 27 June 1989.

Sources: Notifications of the Government to the United Nations Secretary-General dated 7 June 1989 and 11 July 1989.

(Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

Bangladesh: Martial law proclaimed on 24 March 1982. Terminated on 10 November 1986.

Sources: Letter from the Government dated 22 July 1987. (First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/Rev. 1, paras. 18 and 27).

State of emergency declared on 27 November 1990. Lifted on 6 December 1990.

Sources: Information received from non-governmental organizations and published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Bolivia: State of emergency proclaimed on 18 September 1985. Terminated on 19 December 1985.

State of emergency proclaimed on 27 August 1986. Terminated on 27 November 1986.

State of emergency proclaimed on 15 November 1989. Terminated on 15 February 1990.

Sources: Notifications of the Government to the United Nations Secretary-General dated 27 September and 29 October 1985, 6 January, 28 August and 28 November 1986, 16 November and 8 December 1989 and 18 March 1990.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

Brunei Darussalam:* State of emergency proclaimed on 12 December 1962. Still in force.

Sources: Letters from the Government, latest dated 4 April 1991.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I: Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Burkina Faso: Succession of emergency regimes and situations comparable to states of emergency since November 1980.

Sources: Letter from the Government dated 30 April 1991.

Cameroon:* State of emergency proclaimed on 18 April 1984. Still in force.

Sources: Information received from non-governmental organizations. The Special Rapporteur awaits more precise information to be submitted by the Government.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

Canada: State of emergency declared on 23 July 1989 throughout the province of Manitoba. Terminated on 4 August 1989.

Sources: Letter from the Government dated 24 August 1989. (Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Chad: No state of emergency has been formally proclaimed since 1 January 1985. However, a decree dated 7 April 1988 restricted for one week the realization of some human rights and fundamental freedoms.

Sources: Letters from the Government dated 20 July 1988 and 5 February 1991.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 25).

Chile: Proclamation of state of siege (from 7 November 1984 to 17 June 1985 and from 8 September 1986 to 5 January 1987), state of emergency (from 24 March 1984 to 27 August 1988) and state of danger of disturbance of internal peace (from 11 March 1981 to 27 August 1988).

Sources: Notifications of the Government to the United Nations Secretary-General dated, inter alia, 17 June 1985, 22 September 1986, 20 January 1987 and 31 August 1988; letters from the Government dated 10 August 1989 and 21 February 1991.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; doc. E/CN.4/Sub.2/1987/19/Rev.1/Add.1, annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18, 22, 27, 28 and 71; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 24).

China: Martial law imposed in Lhasa, Tibet, on 8 March 1989. Lifted on 1 May 1990.

Martial law imposed in Beijing on 20 May 1989. Lifted on 11 January 1990.

Sources: Letters from the Government dated 8 May and 15 August 1989. Letter dated 12 January 1990 from the Permanent Representative of China (reproduced in doc. E/CN.4/1990/55); information received from non-governmental organizations and other information published in the press.

(Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Colombia:* State of siege proclaimed on 10 May 1984. Still in force.

Sources: Letters from the Government dated 21 December 1987, 13 July 1988 and 18 April 1989.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Ecuador: Repeated proclamation of state of national emergency (14 to 17 March 1986, 28 to 30 October 1988, 31 May to 1 June 1988 and 27 September to 13 October 1989).

Sources: Letters from the Government (latest dated 12 January 1990); notifications of the Government to the United Nations Secretary-General dated 14 and 18 March 1986, 28 and 30 October 1987, 1 and 2 June 1988 and 2 August 1989.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 28 and annex I).

Egypt: State of emergency has been in force since 6 October 1981. It was extended for a three-year period from 1 May 1988 to 31 May 1991.

Sources: Letter from the Government dated 28 March 1991; information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

El Salvador: Suspension of certain constitutional guarantees since 6 March 1980. Successive extensions of martial law in 1984-1985. Termination of state of emergency on 12 January 1987. Further suspension of constitutional guarantees on 12 November 1989 for 30 days, subsequently extended until mid-April 1990.

Sources: Notifications of the Government to the United Nations Secretary-General dated 3 November 1983, 31 July 1985, 13 November 1989 and 5 January 1990; letters from the Government, latest dated 18 August 1989; information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev. 1, paras. 18 and 27; Third report, doc. E/CN.4/Sub.2/1989/30/Rev. 2, paras. 21 and 24 and annex I).

Ethiopia: The existence of a de facto state of emergency for quite some time has been reported.

In May 1991, a curfew was introduced in Addis Ababa. The Government has not yet communicated to the Special Rapporteur the information regarding all emergency measures taken in connection with recent events in the country.

Sources: Information received from non-governmental organizations and published in the press.

Fiji: State of public emergency proclaimed on 14 May 1987. Terminated on 5 December 1987.

Sources: letters from the Government dated 6 November and 7 December 1989.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para 24).

France: State of emergency proclaimed in New Caledonia and dependencies on 12 January 1985. Extended until 30 June 1985.

State of emergency proclaimed in Wallis and Futuna on 29 October 1986.

Terminated on 30 October 1986.

Sources: Notification of the Government to the Secretary-General of the Council of Europe; letter of the Government dated 9 July 1987.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27.

Gabon: State of siege introduced in the province of Port-Gentil. Curfew in force since May 1990.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Gambia: State of emergency proclaimed on 2 August 1981. Terminated on 8 February 1985.

Sources: Information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev. 1, para. 27).

Haiti: State of siege proclaimed on 29 January 1986. Terminated on 14 February 1986.

Sources: Letters of the Government dated 10 June 1987 and 16 March 1989.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 24).

State of siege introduced on 20 January 1990. Lifted on 30 January 1990.

Sources: Commission on Human Rights resolution 1990/56 of 7 March 1990; Reports on human rights situation in Haiti prepared by Mr. P. Texier, Independent Expert (doc. E/CN.4/1990/44/Add.1, paras. 1 and 20; E/CN.4/1991/33, paras. 3, 11 and 125).

Honduras: State of emergency proclaimed on 8 April 1988. Terminated on 13 April 1988.

Sources: Information received from non-governmental organizations and published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

India: The Special Rapporteur awaits more precise information from the Government concerning the measures taken in Kashmir, Punjab, areas in the north-east and in Andhra Pradesh, where, according to non-governmental sources, certain constitutional guarantees were said to have been suspended. It was also reported in the press that curfews had been imposed for short periods in some other regions as well.

Iraq: The Special Rapporteur awaits information from the Government concerning the emergency measures taken during the armed conflict and afterwards in connection with the events that have taken place in the Kurdish provinces.

Israel:* State of emergency in force since May 1948.

Sources: Letter from the Government dated 28 May 1991.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1/Add.2, chapter V; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

Territories occupied by Israel:* Emergency legislation in force.

Sources: United Nations reports and information received from non-governmental organizations. The Special Rapporteur awaits more precise information to be submitted by the Government.

(Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Jordan:* Martial law declared on 5 June 1967. Still in force.

Sources: Reports of Jordan to the Human Rights Committee (doc. CCPR/C/1/Add.55, CCPR/C/1/Add.56 and CCPR/C/46/Add.4); information received from non-governmental organizations.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18;

Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Kuwait: Emergency regime introduced for a few days after the withdrawal of Iraqi troops.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Lesotho:* State of emergency declared on 25 February 1988. Reinstated on 2 May 1988.

Sources: Information received from a non-governmental organization. The Special Rapporteur awaits more precise information to be submitted by the Government.

(Second report, doc. E/CN.4/Sub.2/1988/Rev.1, para. 18).

Liberia:* Suspension of certain constitutional guarantees since July 1990. Curfew enforced in the capital.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Malaysia:* State of emergency throughout the country proclaimed on 15 May 1969. Still in force.

Sources: Information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

Mali:* State of emergency declared on 22 March 1991.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Mauritania: A curfew was introduced in rural areas of the south. A de facto state of emergency has been reported to exist in the Senegal river valley.

Sources: Information received from non-governmental organizations. The Special Rapporteur awaits more precise information to be submitted by the Government.

Myanmar:* State of emergency proclaimed at Prome on 22 July 1988 and in the Yangon (Rangoon) region on 3 August 1988. Terminated on 24 August 1988.

Martial law introduced on 18 September 1988 and is still in force. By end of May 1990, it was lifted in 102 townships.

Sources: Letters from the Government dated 29 June 1987, 16 May and 17 August 1989, 26 January, 7 May and 14 June 1990 and 4 March 1991; information received from non-governmental organizations.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18, 20 and 28; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

Nicaragua: State of emergency was in force, with brief interruptions, from 15 March 1982 to 19 January 1988, and from 20 October to 15 November 1988.

Sources: Notifications of the Government to the Secretary-General of the United Nations, latest dated 4 February, 21 October and 16 November 1988.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; doc. E/CN.4/Sub.2/1987/19/Rev.1/Add.2, annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27 and Annex I).

Pakistan: Martial law was in force from 5 July 1977 to 30 December 1985.

State of emergency proclaimed on 17 August 1988. Terminated on 1 December 1988.

Sources: Letters from the Government, latest dated 24 October and 5 December 1989.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, paras. 22, 30 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Panama: State of emergency proclaimed on 10 June 1987. Terminated on 29 June 1987.

Sources: Notifications of the Government to the Secretary-General of the United Nations dated 11 and 30 June 1987.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Papua New Guinea: State of emergency proclaimed on 17 June 1985. Terminated on 21 October 1985.

Sources: Information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

State of emergency declared on 26 June 1989. On 12 January 1990 extended for further two months.

Sources: Information received from a non-governmental organization. The Special Rapporteur awaits more precise information to be submitted by the Government.

Paraguay: State of siege, which had been in force since 1954, was terminated on 9 April 1987.

Sources: Letters from the Government, latest dated 27 April 1987 (doc. E/CN.4/Sub.2/1987/18).

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 27).

Peru:* State of emergency is currently in force in a considerable part of the territory; extension of states of emergency in certain provinces and departments and declaration of new states of emergency are periodically reported.

Sources: Notification of the Government to the United Nations Secretary-General (latest dated 15 March 1991); letters from the Government addressed to the Centre for Human Rights (latest dated 8, 9, 22 and 24 April, 23 May, 5 and 18 June 1991).

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; doc. E/CN.4/Sub.2/1987/19/Rev.1/Add.1, annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 24 and Annex I; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Philippines:* De facto states of emergency lasting only a few days were proclaimed in February 1986 during the revolution and at the time of the attempted coup d'état of 28 August 1987.

Sources: Letter from the Government dated 10 December 1987.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 22).

State of national emergency proclaimed on 6 December 1989. Still in force.

Sources: Letter from the Government dated 2 April 1991.

Republic of Korea: Emergency measures taken in connection with recent street riots in the capital caused by clashes between students and the police.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Rwanda:* State of siege declared in October 1990.

Sources: Statement by the Minister of Justice of Rwanda of 17 January 1991; information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Senegal: State of emergency was proclaimed from 29 February to 20 May 1988 and from 28 April to 19 May 1989.

Sources: Letters from the Government dated 20 September 1988 and 15 January 1990.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 28; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 24).

Sierra Leone:* State of emergency declared on 2 November 1987. Renewed on 8 March 1988.

Sources: information received from a non-governmental organization. The Special Rapporteur awaits more precise information to be submitted by the Government.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

Singapore: Emergency legislation currently in force which expressly provides for preventive detention.

Sources: Letter from the Government dated 18 August 1989; information received from non-governmental organizations.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Somalia: Emergency regulations in force in areas affected by armed conflict.

Sources: Information received from non-governmental organizations. The Special Rapporteur awaits more precise information to be submitted by the Government.

South Africa: State of emergency in 36 magisterial districts was proclaimed on 21 July 1985. A country-wide state of emergency has existed since 12 June 1986. Successive proclamations or extensions of states of emergency as well as lifting of some emergency regulations took place in 1987, 1988, 1989 and 1990. On 7 June 1990, the state of emergency was lifted in all areas of the country, except Natal. The lifting of the state of emergency in Natal province was announced on 18 October 1990.

Sources: Letters from the Government dated 1 September 1988 and 6 July 1989 (cf. E/CN.4/Sub.2/1989/45); information submitted by the Special Committee against Apartheid; information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and annex I; doc.E/CN.4/Sub.2/1987/19/Rev.1/Add.2, Chapter IV.B; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 23;

Third report, doc. E/CN.4/Sub.2/1989/30/Rev.1, para. 18 and annex I; doc.E/CN.4/Sub.2/1989/30/Rev.2, para. 21 and annex I).

Sri Lanka:* State of emergency proclaimed on 18 May 1983. Terminated on 11 January 1989.

State of emergency declared on 20 June 1989. Still in force.

Sources: Notifications of the Government to the Secretary-General of the United Nations dated 21 and 23 May 1984 and 13 January and 18 August 1989; letter from the Government dated 11 April 1991.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 24).

Sudan:* States of emergency proclaimed on 6 April 1985, 25 July 1987 and 30 June 1989. Still in force.

Sources: Report of Sudan submitted to the Human Rights Committee, dated 15 February 1991 (doc. CCPR/C/45/Add.3); information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

Suriname: State of emergency was in force from August 1980 to 25 February 1986. On 1 December 1986, state of emergency was proclaimed in eastern part of the country. Terminated on 1 September 1989.

Sources: Letters from the Government dated 5 December 1986 (reproduced in doc. A/41/958) and 13 March 1991; information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18 and 22).

Syrian Arab Republic:* State of emergency proclaimed on 8 March 1963. Still in force.

Sources: Information received from non-governmental organizations. The Special Rapporteur awaits more precise information to be submitted by the Government.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18).

Thailand:* Martial law introduced on 23 February 1991.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Togo: In April 1991, a curfew was introduced in Lomé, capital of the republic.

Sources: Information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

Trinidad and Tobago: State of emergency proclaimed on 28 July 1990. On 10 August 1990, it was extended for a further period of 90 days.

Sources: Notification of the Government to the Secretary-General of the United Nations dated 15 August 1990.

Turkey:* Martial law, which was introduced on 26 December 1978 in 13 provinces, was proclaimed throughout the entire territory on 12 September 1980. As at 1 January 1985, it was in force in 34 provinces. By 19 July 1987 martial law was lifted throughout the country. In 1985-1987, in certain provinces, martial law was replaced by a state of emergency which is currently in force in 10 provinces in south east Anatolia.

Sources: Letters from the Government dated 9 June 1987, 19 July 1988 and 15 February 1991; information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 27 and annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Union of Soviet Socialist Republics:* Since 15 January 1990, a state of emergency has been in force in the territory of the Nagorno-Karabakh autonomous region, the regions of the Azerbaijan SSR adjacent thereto, the Gorissa region of the Armenian SSR and the border zone along the state frontier between the USSR and the territory of the Azerbaijan SSR;

Since 20 January 1990, a state of emergency is in force in the city of Baku;

On 12 February 1990, a state of emergency was declared in Dushanbe (Tadzhik SSR).

Sources: Notifications of the Government to the United Nations Secretary-General dated 15 and 19 January and 23 March 1990.

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, annex I; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

On 4 June 1989, a curfew was introduced in several townships of Fergana district (Uzbek SSR);

On 19 June 1989, a curfew was introduced in the town of Novy Uzen, Guriev district of Kazakh SSR. Lifted on 24 July 1989;

In July 1989, a curfew was introduced in Isfara region of Tadzhik SSR;

On 18 July 1989, a "special regime of conduct for citizens" was introduced in Abkhaz ASSR (Georgia);

On 7 June 1990, a state of emergency was introduced in Osh town and in Osh region (Kirghiz SSR);

In June 1990, a state of emergency was introduced in Azerbaijan SSR along its border with Armenian SSR;

From 7 June to 21 November 1990, a state of emergency was in force in Frunze (Kirghiz SSR);

On 29 August 1990, a state of emergency was introduced in Armenian SSR;

From 26 October to 6 December 1990, a state of emergency was in force in several southern districts of the Moldovian SSR;

On 12 December 1990, a state of emergency was introduced and subsequently extended in Tskhinvali and Dzhavski district (South Ossetia);

In April 1991, a state of emergency was introduced in Vladikavkaz (North Ossetia);

In June 1991, a state of emergency was introduced in Makhachkala, the capital city of Daguestan, for a period of one month.

Sources: information received from non-governmental organizations; information published in the press. The Special Rapporteur awaits more precise information to be submitted by the Government.

United Kingdom of Great Britain and Northern Ireland:*

Since 1974, a public emergency exists relating to the affairs of Northern Ireland.

Sources: Notification of the Government to the United Nations Secretary-General dated 23 December 1988; communication from the Government received by the Secretary-General on 18 December 1989; reports to the Human Rights Committee (latest documents: CCPR/C/58/Add.6, paras. 57-60; CCPR/C/58/Add.12, para. 18).

(Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, para. 18; Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, para. 21).

Venezuela:

Emergency measures and suspension of certain constitutional guarantees were decreed on 28 February 1989.

On 22 March 1989, all the constitutional safeguards were re-established.

Sources: Notifications of the Government to the United Nations Secretary-General dated 17 and 31 March 1989; letters from the Government dated 3 and 18 April 1989 and 7 December 1990.

(Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

Yugoslavia:

On 28 March 1989, special measures involving suspension of freedoms of assembly and movement were introduced in the province of Kosovo. On 18 April 1990, all the emergency measures in the territory of the province were lifted.

Sources: Notifications of the Government to the United Nations Secretary-General dated 14 April 1989, 29 May 1989, 19 March 1990 and 24 April 1990.

(Third report, doc. E/CN.4/Sub.2/1989/30/Rev.2, paras. 21 and 24).

Zimbabwe:

State of emergency, which has been in force since November 1965, was lifted on 25 July 1990.

Sources: Letters from the Government dated 23 March and 12 July 1988; information received from non-governmental organizations.

(First report, doc. E/CN.4/Sub.2/1987/19/Rev.1, para. 30 and Annex I; Second report, doc. E/CN.4/Sub.2/1988/18/Rev.1, paras. 18, 26 and 35 and annex I).

12. The Special Rapporteur is aware of the possibility that the existence of a state of emergency in other countries might not have come to his knowledge and trusts that the cooperation of States and intergovernmental and non-governmental organizations in the procedure being applied will soon enable him to give a full account of the situation worldwide.

13. In the opinion of the Special Rapporteur, the preparation of a map indicating the countries which, since 1 January 1985, have introduced a state of emergency in their territory, would be extremely useful. Such a map could be an excellent visual means of illustrating and understanding the extent of the phenomenon.

14. A geographic map of Central and South America showing the situation with regard to states of emergency in this region is attached to this chapter. It is evident from this map that, notwithstanding the democratic changes that have taken place in this area in the last decade, there are very few countries which have not had recourse to a state of emergency during the said period. Thus, only 4 out of 13 countries of South America have not had introduced or maintained a state of siege or emergency in their territory since 1 January 1985.

15. In his future reports, the Special Rapporteur intends to continue to present to the Sub-Commission and the Commission on Human Rights similar maps covering other continents and, in the final analysis, a map of the world.

States of Central and South America which, since 1 January 1985, have proclaimed, extended or terminated a state of emergency.

II. INTERNAL AND INTERNATIONAL LEGALITY OF STATES OF EMERGENCY

16. It may be recalled that, after examining the Special Rapporteur's successive reports, the Sub-Commission, by resolution 1987/25, took note of the importance for the effective enjoyment of human rights of respect for the rules, national and international, guaranteeing the legality of states of emergency. Further, in 1988, the Sub-Commission recognized the fundamental importance of having specific and effective national legislation in every country to deal with these situations in a manner conforming to international norms, and invited Governments which had not yet done so to consider the adoption of internal legislation consistent with the requirements of international instruments concerning states of emergency (resolution 1988/24).

17. In order to be in a position to examine the internal legality of the measures adopted by Governments and its relationship to international law, the Special Rapporteur requested all relevant information in each case, through the Secretary-General, concerning the constitution, the law, customary law, etc., and the actual application of those instruments and principles, particularly by the judicial authorities. When he had obtained sufficient information, the Special Rapporteur proceeded to draw up the explanatory tables to which we refer.

18. Given the length of this report, the Special Rapporteur will not submit to the Sub-Commission this year a summary table by State, as he has done until now. He wishes to indicate that several such tables are being prepared on the following countries or territories, among others: USSR, Yugoslavia, Sri Lanka, the Israeli occupied Arab territories, etc.

III. EFFECT ON HUMAN RIGHTS OF MEASURES ADOPTED DURING STATES OF EMERGENCY

19. In his series of reports, the Special Rapporteur has had occasion to deal with this point and to draw attention, inter alia, to the adverse effect that the improper or unlawful introduction of states of emergency can have on certain fundamental human rights and on specific groups of persons who are particularly exposed in this kind of situation.

20. As regards the first point, reference may be made to his earlier findings, specifically with regard to the inalienable rights and, in particular, to his study on the effect of states of emergency on the right to life and the prohibiton of torture. 2/ A recent study by Amnesty International on torture and violations of the right to life during states of emergency 3/ shows how these can, de facto, pave the way for violation of inalienable rights.

21. Accordingly, the Special Rapporteur drew to the attention of Governments, other special rapporteurs (in particular, the Special Rapporteurs on summary executions and torture) and the Chairmen of interested working groups (especially the Chairmen of the Working Group on Enforced or Involuntary Disappearances and of the Working Group on Detention) the importance of giving special attention to the protection of the right to life during states of emergency and of promoting any measure that may serve to strengthen it.

22. Earlier reports have also laid emphasis on the need to strengthen the protection of all those persons or groups of persons who, owing to various circumstances, find themselves in a particularly vulnerable situation. This applies to refugees, victims of armed conflicts, children, minorities, indigenous peoples, foreigners, etc. In this connection, one aspect of the matter which becomes particularly serious during states of emergency is the adoption of specific measures directed against such groups of persons whose situation - normally insecure - is aggravated by the circumstances of the emergency.

23. In support of this statement, the United Nations High Commissioner for Refugees has repeatedly affirmed that wholesale violations of human rights give rise to persecution, which in turn compels the victims to seek asylum in other countries. According to UNHCR, a state of emergency in the country of asylum tends to have a negative effect on the protection of refugees if it involves basic restrictions on fundamental rights. For this reason, UNHCR welcomes the Sub-Commission's efforts in this field since it believes that a proper understanding of the particularly vulnerable situation in which refugees generally find themselves will help to improve protection.

24. Likewise, FAO has pointed out to the Rapporteur that states of emergency, even if not a consequence of disasters or of internal armed conflicts, and the refugee movements that usually occur can interrupt the supply of food resources, affecting certain minorities and even wider sectors of society. It therefore suggests that, in such situations, due account should be taken of the population's food needs.

25. Lastly, the Special Rapporteur would recall the comments made in his earlier reports concerning the special situation of specific persons such as members of parliament, members of opposition parties and champions of human rights who, because they play a decisive role in democratic life, are usually the victims of arbitrary measures during states of emergency. 4/ The Inter-Parliamentary Union, which had established a special committee on the protection of the human rights of members of parliament, has a considerable amount of information on this matter which highlights the very serious nature of the problem.

Arbitrary detentions and states of emergency

26. In earlier reports the Special Rapporteur referred at length to the negative effect which states of emergency frequently have on detained persons. For instance, in his second report, he pointed out that "One of the essential points which emerges from the synopses of information received since 1983 from non-governmental organizations [...] (E/CN.4/Sub.2/1983/13, E/CN.4/Sub.2/1984/13, E/CN.4/Sub.2/1985/13, E/CN.4/Sub.2/1987/13) is that the most serious violations of the human rights of detainees occur most frequently during states of emergency, states of siege or situations of internal or international armed conflict. Unlawful detention, torture, political assassinations, summary executions, and the enforced or involuntary disappearance of persons in particular are frequently connected with the exceptional powers granted under emergency measures to the security forces, the police or the army. Such abuses are encouraged by the fact that, during a period of emergency, restrictions are imposed on certain essential rights". 5/

27. The Special Rapporteur proposes in this report to deal briefly not with the problem of the situation of persons detained during a state of emergency, but rather with the problem of the detentions that occur in such circumstances.

28. It is apparent, from the wealth of information received by the Rapporteur in recent years, that "the right to liberty ... of person", provided for under article 9 of the International Covenant on Civil and Political Rights, is one of the rights that is most affected during states of emergency. A rereading of the earlier reports suffices to confirm this statement, which applies worldwide. In fact, there are very few occasions on which a state of emergency is not accompanied by the suspension of this right, so it may be said, with virtual certainty, that there is some causal link between states of emergency and certain forms of arbitrary detention. Moreover, the Special Rapporteur is convinced that it is during this kind of situation that a greater number of arbitrary detentions are recorded and that the problem is becoming more acute.

29. The Special Rapporteur therefore welcomes the recent establishment under ECOSOC decision 1991/243 of the Working Group on Arbitrary Detention. This Group, whose working method has yet to be decided, is called upon to fulfil an advisory and preventive role which the various Special Rapporteurs on related matters (torture, summary executions and states of emergency) have been unable to carry out adequately as it would have been outside their respective mandates. None the less they have repeatedly drawn attention to the pressing need to establish it.

30. The establishment of a special procedure to put an end to arbitrary detentions represents one of the most significant steps taken in recent years in this field, and the Special Rapporteur deems it appropriate, if only to facilitate his future work, to draw the attention of the Working Group on Arbitrary Detention to some special aspects which he feels the question of detention presents in the specific context of states of emergency. They vary in nature and relate both to the extent of the detentions and to their duration, diversity and complexity.

Extent

31. As it would have been outside his mandate, the Special Rapporteur has never carried out a detailed assessment of the number of persons whose right to liberty has been affected by this kind of measure. Except in rare cases, it has not thus far been the practice of Governments to notify the Special Rapporteur or the depositaries of the relevant international instrument (the United Nations Secretary-General in the case of the International Covenant on Civil and Political Rights, for instance) of the exact number, still less of the names of persons detained or arrested under a state of emergency. A few figures will, however, suffice for an appreciation of the extent of the problem and the importance of the Group's future activities.

32. In recent information received by the Special Rapporteur from the Chilean Government it is noted that, during the de facto regime, in the period 1973-1980, some 200,000 persons were deprived of their liberty. According to a non-governmental organization, one in every three persons was arrested or interrogated in Uruguay while the "emergency security measures" (introduced by the military regime which governed the country from 1971 to 1985) were in force.

33. In South Africa, where systematic recourse was also had to this kind of measure to perpetuate the scourge of apartheid, about 30,000 persons, 40 per cent of whom were under 18 years of age, were detained for a period of more than 30 days between June 1986 and August 1987 under the Internal Security Act.

34. According to the report submitted by Mr. Louis Joinet, Special Rapporteur on the practice of administrative detention, after the Viet Nam war, between 10,000 and 15,000 people were detained for re-education purposes between 1975 and 1976. 6/

Duration

35. It frequently happens during states of emergency that persons detained primarily for security reasons remain in that situation indefinitely. There have been instances where the authorities have ordered the administrative detention of persons charged with political offences who had been acquitted by the courts or else they have continued to be held in detention after having served lengthy sentences.

36. The same report by Mr. Joinet notes that 120 persons detained in "re-education camps" in Viet Nam will soon have completed 15 years in custody. 7/

37. During this decade, the Inter-American Commission on Human Rights has repeatedly drawn attention to the perpetuation of states of emergency throughout the Americas and the wrongful nature of the prolonged detention that goes with them.

Complexity

38. It is very important to bear in mind situations in which, because a state of emergency is in force, Governments tend to resort to the application of ordinary measures (for instance, administrative detention). This juxtaposition of measures is very frequent in the Americas and some Asian countries. In this connection, the Inter-Parliamentary Union has had occasion to concern itself with parliamentarians from Asian countries who have been detained for more than 20 years under this dual arrangement.

39. In Argentina, for instance, during the various de facto regimes that existed prior to 10 December 1983, thousands of persons were held at the disposal of the Executive Authority and the majority of those charged and prosecuted were also made subject, additionally, to administrative detention. They were thus unable to benefit either from release on parole or conditional release or even unconditional release on the ground that they were innocent or had served their sentence. In short, the court could order freedom, but the Executive had already ordered detention.

Diversity

40. Lastly, the Special Rapporteur wishes to call the Working Group's attention to certain situations which are not necessarily identifiable by the word "detention" but which can lead to serious interferences with the right to personal liberty.

41. We refer, for instance, to "arrest" (arresto) whereby, during states of siege, the Executive can, on grounds of security, house certain persons "in places which are not prisons". In practice, this latter requirement is rarely met and the persons are housed in prison establishments, thus transforming arrest into detention and detention into arbitrary detention. Moreover, according to the information received from the Chilean Government to which we have referred above, Chilean jurisprudence during the Pinochet regime held that the power of arrest authorizes the holding of a person incommunicado, and it was noted that the lack of any regulation requiring the place where the person was housed to be made public had legalized the practice of secret detention.

42. The restrictions on freedom of movement which are usually adopted when there is a curfew, or the prohibition on leaving any place placed on certain persons, can in certain circumstances be transformed into a serious interference with personal liberty. We refer to internal exile or enforced residence in specific places or areas which, because of their isolation and the fact that detainees are held incommunicado, can be harsher than a prison. Such measures are, moreover, usually accompanied by constant transfers to places far distant from their own area, making contact with their family extremely difficult.

IV. SUMMARY OF THE METHOD AND PROCEDURE APPLIED BY THE SPECIAL RAPPORTEUR

43. In preparing his fourth annual report, the Special Rapporteur considers it appropriate to summarize the method and procedure applied in preparing his studies since the methodology he uses has some new features and because from the outset he has been afforded cooperation by Governments and non-governmental organizations, thus making for an ad hoc procedure in the true sense.

44. It is clear from the preceding chapters that the methodology applied is based essentially on the principle of argument and counter-argument. This means that in order to obtain an appropriate context of objectivity the Special Rapporteur has adopted the practice of informing the Governments concerned, before his reports are published, of any information or comment received from other sources which might appear to be at odds with the information transmitted by the Governments.

45. The steps that make up this procedure are usually the following:

(a) The Special Rapporteur, through the Secretary-General, sends a note to Governments requesting, inter alia, information on the proclamation, extension or termination of a state of emergency, as well as on any measures which might have been adopted while it was in force. The Special Rapporteur, or at his request, the Secretariat, often contacts a Government in order to obtain clarifications on these matters. Only in the event that the Special Rapporteur does not receive a reply from the Government concerned does he prepare a list on the basis of information transmitted by other reliable sources or information which has appeared in the press. The outcome is that, on reading the report prepared in this way, Governments send the Special Rapporteur the relevant clarifications and/or comments for subsequent publication;

(b) It is usual for the same note from the Secretary-General to request Governments for information on articles of the Constitution, laws and other standards that regulate the legality of states of emergency, and on the actual implementation of these standards by magistrates. Frequently, non-governmental organizations also send information in this regard and at the end of each report the Special Rapporteur identifies the articles, reviews and publications which various associations, university teachers and other specialists have sent to him through the Centre for Human Rights. Thanks to its content and diversity, the information obtained in this way has been extremely useful in preparing the summary tables which have been published in previous reports with regard to some 40 countries;

(c) The procedure has acquired its greatest force of contradiction precisely during the stage of analysing the impact on human rights of measures adopted during a state of emergency. For example, if the Special Rapporteur receives specific information from reliable sources on human rights violations in a country in this situation, before publishing the allegations in his report he transmits them to the Government concerned for its information and in order to obtain its reaction. If the circumstances make it advisable, the

Special Rapporteur may also consult these sources - generally non-governmental organizations - once again, so that the report will adequately reflect both points of view, particularly if they are divergent or contradictory.

46. This method of work, which usually includes successive consultations with Governments and sources of information, guarantees that both have an opportunity to contribute all the data that they deem relevant, and also provides both with a suitably impartial context. However, apart from the requisite pursuit of objectivity, it is important to stress that, in view of the cooperation which the Special Rapporteur receives from most Governments, this procedure has proved extremely useful for the protection of human rights. Not infrequently, while the procedure was under way, the non-governmental organizations themselves have informed the Special Rapporteur of the cessation of certain violations.

47. Lastly, the Special Rapporteur would like to express his appreciation to the non-governmental organizations without whose cooperation this phase of his report would frankly have been poorer. He would also like to express his gratitude to those Governments which have consistently supported his work and in some cases have put themselves at his disposal. They include, inter alia, Canada, China, El Salvador, Peru, Senegal, Sri Lanka, USSR and, more recently, Chile, and some others.

V. CRITERIA AND MODEL LEGAL PROVISIONS APPLICABLE IN EMERGENCY SITUATIONS

48. At the request of the Special Rapporteur, both the Sub-Commission and the Commission on Human Rights have frequently drawn attention to the fundamental importance of the existence in each country of specific and effective legislation, consistent with the requirements of the international standards that regulate the question.

49. In order to achieve this objective, the Sub-Commission invited the Special Rapporteur to prepare, together with Mr. Joinet, the expert responsible for the report on administrative detention, draft standard provisions on states of emergency.

50. For the record, it may be recalled that in his third revised annual report (document E/CN.4/Sub.2/1989/30/Rev.2), the Special Rapporteur set out a number of general criteria with which national legislation would have to be brought into line in order to avert adverse and unnecessary repercussions on the effective enjoyment of human rights during states of emergency. Moreover, in the same document, he commented on the Constitution of Namibia, adopted on 9 February 1990, since, in the opinion of most experts, it was a veritable model constitution in this respect.

51. Further, the Special Rapporteur has cooperated, in the context of the advisory services, with a number of Governments which are engaged in reforming their domestic legislation, as in the case of the recent constitutional reform in Colombia and the reform soon to take place in Paraguay.

52. Lastly, in order to comply with the Sub-Commission's request in resolution 1990/19, reiterated by the Commission on Human Rights in its decision 1991/108 and endorsed by the Economic and Social Council in its decision 1991/262, the Special Rapporteur intends to approach, in this and subsequent reports, the task of preparing standard legal provisions which can be used as a reference model for Governments. This will have the dual purpose of giving rise to reforms and ensuring an adequate internal control of states of emergency.

53. The complexity of the topic and the diversity of the legal systems dominating in the various countries which form part of the United Nations system made it necessary for the Special Rapporteur, together with Mr. Joinet, to convene a group of experts from different continents to address jointly the initial phase of the delicate but arduous task entrusted to him.

54. A meeting of experts on the drafting of model legal provisions governing states of emergency was organized at the Palais des Nations in Geneva from 12 to 14 March 1991 by the Association of International Consultants on Human Rights (CID), with financial assistance from the Governments of Greece, Sweden and Switzerland. 8/

55. The outcome of this meeting was the initial draft guidelines for the development of legislation on states of emergency which are contained in annex I to this report in order to inform the Sub-Commission and the Commission of the progress of the Special Rapporteur's work in this regard.

Notes

1/ Subsequently, by its resolution 1987/25, the Sub-Commission decided to examine this issue, as a matter of high priority, under the agenda item "The administration of justice and the human rights of detainees: (b) Question of human rights and states of emergency".

2/ E/CN.4/Sub.2/1988/18/Rev.1, paras. 38-59.

3/ States of emergency: torture and violations of the right to life under states of emergency. Amnesty International publication SC/PG/CO/GR, London, July 1988.

4/ E/CN.4/Sub.2/1988/18/Rev.1, paras. 66-71.

5/ E/CN.4/Sub.2/1988/18/Rev.1, para. 68.

6/ E/CN.4/Sub.2/1990.29, para. 41.

7/ Ibid.

8/ It was attended by many well-known lawyers and persons of recognized competence in the field of human rights. Among them were A. Artucio (International Commission of Jurists), I.G. Barsegov (USSR), L. Despouy (Argentina), P. Duffy (Great Britain), P. Horawangkura (Thailand), L. Joinet (France), U.V. Kadam (India), A. Mahiou (Aleria), H. Montealegre (Chile), B. N'Diaye (Senegal), Daniel O'Donnell (Defence for Children International), D. Prémont (CID), T. Ramishvili (USSR), D. Shelton (USA), A.-L. Svensson-McCarthy (Sweden), M. Tardu (France), W. Taylor (Amnesty International), D. Zovatto (Costa Rica) and others. The experts have entrusted Mr. Daniel O'Donnell with the task of collecting, coordinating and harmonizing various proposals made and drafting the text of model legal provisions concerning states of emergency.

Annex I

GUIDELINES FOR THE DEVELOPMENT OF LEGISLATION ON STATES OF EMERGENCY*

Part One

1. General Principle

No state of emergency should be declared or renewed except in conformity with the Constitution, obligations arising under international law and legislation concerning states of emergency and their consequences. Legislation concerning states of emergencies should be adopted, incorporating the relevant international standards into the national law and carefully defining the extent to which the constitutional order may be altered during an emergency situation. It should govern any type of emergency or state of exception which might arise or be declared.

Commentary

This first guideline has several purposes. First, it is intended to clarify the scope of legislation concerning states of emergency. Any legislation which is enacted should cover any state of emergency which might be proclaimed by the national authorities. In some countries the legal system recognizes different classes or types of emergency, differing according to their consequences, their gravity, and in some cases, their cause. 1/

States of emergency have often been used by unconstitutional governments to effect far-reaching changes in the legal system (affecting, for example, the rights of citizens, balance of powers and legitimacy of those in power). 2/ In providing in effect that any state of emergency not proclaimed in accordance with the constitution and the legislation on states of emergency is illegitimate, this guideline is intended to ensure that states of emergency remain a legal institution which gives the Rule of Law sufficient flexibility to respond effectively to extraordinary circumstances, while precluding their use to provide a legal facade for de facto measures which alter the legal system in an irregular fashion. 3/

The reference to "obligations arising under international law" is intended to ensure that nothing in national legislation concerning states of emergency is incompatible with the obligations of the State under international law, including the provisions of international treaties such as the International Covenant on Civil and Political Rights (art. 4), the European Convention on Human Rights (art. 15), the American Convention on Human Rights (art. 27), obligations under treaties which do not provide for derogation 4/ and customary international law. The reference to renewal

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* These initial draft guidelines and commentaries thereto are submitted solely for information of the Sub-Commission and the Commission on Human Rights.

of a state of emergency is intended to ensure that a state of emergency may not be prolonged or extended without compliance with the same procedures and requirements governing the declaration of a state of emergency, in particular those concerning proclamation and ratification (arts. 2 and 4).

2. Proclamation of a state of emergency

(a) The legislation should authorize the competent authority to declare a state of emergency only in the event of a grave disruption of organized life of the community endangering the vital interests of the population which the measures normally compatible with the Constitution and laws in force are plainly inadequate to redress, or a present or imminent threat of such disruption, and only in order to safeguard the rights and security of the population and the functioning of public institutions within the rule of law.

(b) The declaration of a state of emergency should be required to state clearly the circumstances which motivate it, the emergency measures which are authorized, any provisions of the Constitution, law and obligations arising under international law which may be affected by such measures, and the area and the period for which the declaration shall have effect, unless rescinded earlier.

Commentary

Paragraph (a) suggests a definition of the circumstances which justify declaration of a state of emergency which may serve as a useful guideline for drafting domestic legislation or, eventually, a Constitutional provision.

The International Covenant on Civil and Political Rights defines the circumstances justifying derogation as "a public emergency which threatens the life of the nation". The European Convention on Human Rights uses the same phrase, adding express reference to war, while the American Convention on Human Rights refers to "war, public danger or other emergency that threatens the independence or security of a State Party". However, there is a danger in incorporating into the internal legal order broad formulae such as those used in these international instruments, because they may lend themselves to being interpreted to include threats of an abstract nature having little immediate, tangible impact on the society, thus potentially encouraging an over-reaction to threats of this kind. The definition used in these guidelines, derived largely from the jurisprudence of the European Commission and Court of Human Rights, therefore spells out what is meant by a "threat to the life of the nation" in more concrete terms. It has four main elements.

Like the jurisprudence of the European human rights system, the definition employed in guideline 2 (a) requires a "grave disruption of the organized life of the community". 5/ It further qualifies this first element of the definition by adding that the disruption must be such as to endanger the "vital interests of the population". Thus even serious disruption of the organized life of the community - e.g. public transportation, commerce or the functioning of schools or other non-essential institutions - would not

constitute sufficient grounds for a state of emergency if the disruption would not present a serious danger to the life, physical security or other vital interests of the population. 6/

For the state of emergency to be declared, the disruption described above must exist, or the threat of such disruption must be present or imminent. This is the second element of the definition. 7/

Thirdly, this paragraph provides that a state of emergency can be declared only as a last resort, that is, not only must there be a threat such as described above, but "the measures normally compatible with the Constitution and laws in force" must be "plainly inadequate" to deal with this threat. In the jurisprudence of the European human rights system this is equated with the requirement that a danger must be "exceptional" in order to constitute a threat to the life of the nation. 8/ Most of the rights commonly affected by states of emergency are not absolute. The provisions of international human rights treaties which recognize the right to a public trial and freedom of speech, assembly, association and movement contain "limitation clauses" which define, in general terms, the type of limitations which can be imposed on the enjoyment and exercise of such rights in normal times, i.e. in the absence of any emergency. If a danger to public security could be controlled by "normal" measures which are allowed by such limitation clauses, one cannot conclude that the danger rises to the level of a threat to the life of the nation.

Paragraph (a) further specifies that a state of emergency may only be declared by the competent authorities "in order to safeguard the rights and security of the population and the functioning of public institutions within the rule of law". This fourth element applies to states of emergency a basic principle of human rights law recognized by article 30 of the Universal Declaration of Human Rights, to the effect that nothing "may be interpreted as implying for any State, group or person the right to engage in any activity or to perform any act aimed at the destruction of the rights and freedoms set forth herein". Together with the indication that the emergency must be declared by the competent authorities, this element of the guidelines reinforces the principle that states of emergency should not be misused for purposes incompatible with the fundamental obligation of every State to protect basic human rights, nor to give a facade of legality to de facto regimes. 9/

It should be emphasized that the definition employed in this guideline is no way intended to weaken or substitute the standard established in international treaties but, as indicated above, to identify the elements which constitute a "threat to the life of the nation", the basic requirement for the declaration of a state of emergency established by such treaties.

Paragraph (b) concerns the matters which should be addressed by the declaration. The provision that the declaration shall "clearly state the purposes which motivate it", as well as the consequences of the state of emergency, is intended to facilitate the task of the political and judicial authorities responsible for controlling the legality of the declaration, or of the measures taken pursuant to it. 10/

In comparative law, there are two main approaches to the legal consequences of states of emergency. In some countries, especially of the civil law system, there is a tendency to "suspend" the enjoyment of certain rights for the duration of the emergency; in others, particularly common law legal systems, the principal consequence of a state of emergency is to amplify the powers of public authorities. This affects rights indirectly rather than directly. It legalizes acts within the scope of emergency powers even if they are incompatible with fundamental rights, but the rights remain legally enforceable, to the extent they are not affected by acts within the scope of emergency powers. In providing that the declaration must state "the emergency measures which are authorized" as well as "provisions of the Constitution, law and obligations arising under international law whose legal force may be overridden by such measures", paragraph (b) is equally adapted to either situation.

The provision that "the area and period" for which the emergency shall be in effect must be declared reflects the principle that every state of emergency shall be strictly limited to the requisites of the emergency situation which justifies it; it shall not be prolonged longer than strictly necessary, not affect areas where it is not strictly required. Similarly, the final phrase "unless rescinded earlier" indicates that the declared period of validity of a state of emergency is a maximum period. The duty of the competent authorities to rescind a state of emergency if the underlying causes cease, or are modified substantially, is recognized expressly in guideline 3 (b).

3. Duration of the state of emergency

(a) The legislation should indicate that no state of emergency is valid for more than the period which is strictly necessary.

(b) The legislation should require the competent authorities to terminate the state of emergency immediately if the circumstances which motivated the declaration of emergency cease to exist, or if the resulting threat is reduced to such proportions that measures normally compatible with the law and Constitution are sufficient to control it.

Commentary

A state of emergency must cease as soon as the conditions which justify this departure from the normal legal order cease to exist. This is implicit in the definition of the circumstances which justify declaration of a state of emergency, that is, the existence of a grave and imminent threat to the life of the nation. This is made explicit by article 27.1 of the American Convention on Human Rights, which provides that during an emergency a State may take measures derogating from its obligations under the Covenant "to the extent and for the time strictly required by the exigencies of the situation". The Human Rights Committee has emphasized the "temporary nature" of measures taken pursuant to article 4 of the International Covenant on Civil and Political Rights, indicating that they "may last only as long as the life of the nation is threatened". 11/ Similarly, the United Nations Rapporteur on Human Rights and States of Emergency has identified the "principle of

temporariness" as one of the main criteria for the legality of a state of exception under international law. 12/ Paragraph (a) suggests that the "principle of temporariness" should be incorporated into national law concerning states of emergency.

Paragraph (b) suggests that the legislation should expressly recognize the duty of the competent authorities to lift a state of emergency as soon as there is no longer a threat to the life of the nation, which is implicit in paragraph (a) and existing international law. It also makes clear that the duty to lift the state of emergency does not require that the threat disappear altogether, but merely that it cease to have the characteristics necessary for the declaration of an emergency. Thus, if a threat or danger loses its actuality or imminence, or loses its exceptional character, being reduced to the point where measures normally compatible with fundamental rights would suffice to control it, 13/ the justification for the state of emergency disappears and the duty to lift it applies.

4. Ratification of the declaration

(a) The legislation should provide that a declaration of emergency which is not ratified by the national legislature, or other constitutionally established organ of control, within a brief period established by law, is void.

(b) If the national legislature or other constitutionally established organ of control is in session when a state of emergency is declared, the legislation should provide that it should proceed to consider the legality and necessity of the declaration and necessity of the measures authorized in the declaration immediately and that, if it is not in session, the declaration of emergency should be considered as convocation of an emergency session for such purpose.

(c) The legislation should grant members of the national legislature, or other body responsible for control of the legality of the declaration of emergency, immunity from any measures taken pursuant to the declaration of emergency which might prevent or restrict their participation in proceedings mentioned in paragraph (b).

Commentary

The legislature is the branch of government which has primary responsibility for enacting the laws which govern the functioning of society, including those which define the rights and prerogatives of the persons, institutions and collective bodies which make up the society. In addition, it is usually considered the most representative branch of government, being elected directly, in many countries, and having the responsibility of representing the views and interests of the various regions or sectors of society in establishing policy, while the executive is responsible for directing the apparatus of government.

In most countries the Executive, being primarily responsible for public order, has the responsibility for declaring a state of emergency in the first

instance. 14/ This guideline suggests that the Legislature, because of its double role of law-maker and most representative branch of government, should have responsibility for ratification of a declaration of emergency. Recognition of this role would provide the legislature with an opportunity to prevent the Executive from unilaterally taking measures which may have far-reaching consequences for the legal order it has created, and which may have serious consequences for the rights and interests of certain regions or sectors of the society, whose spokespersons should have the right to be heard and have their views taken into account in the process of taking such a decision.

The reference to "the national legislature or other constitutionally established organ of control" takes into account the circumstances of States having no legislature, or having another higher "organ of control" which is functionally apart from both the Executive and the Legislature, such as a Council of State, which may be entrusted with the responsibility for the review of such major events in the life of the nation as the declaration of a state of emergency.

Paragraph (b) suggests a definition of the scope of control which should be exercised by the Legislature (or other "organ of control"), specifying that there shall be review of the legality and the necessity of the state of emergency. While the need for a state of emergency would be considered an element of its legality in some legal systems, express mention of both aspects is made in order to clarify that there should be review of the adequacy of the grounds for the declaration as well as of compliance with the formal legal requirements concerning such declarations.

Several elements of this guideline are intended to ensure that the intention of this text in regard to review by the legislature or other organ of control is not circumvented. Paragraph (a) provides that the declaration shall be void unless so ratified. No time period is specified, but the text indicates that the law should establish a limit adapted to national circumstances. Similarly, paragraph (b) provides that in the event the national legislature is not in session when an emergency is declared, the declaration shall have the effect of convocation of the legislature. 15/ Paragraph (c) indicates that members of the body responsible for ratification shall have immunity from any emergency measures - such as detention or suspension of mandate - which might prevent or restrict their participation in proceedings concerning ratification. 16/

5. Notification

The declaration of a state of emergency should be required to state the circumstances which motivate it and the area and the period for which the declaration shall have effect, the measures authorized and the provisions of the Constitution, law and obligations arising under international law which may be affected by such measures, and should be communicated to all pertinent international bodies.

Commentary

The International Covenant on Civil and Political Rights obliges a State Party which takes emergency measures derogating from the Convention to inform the other States Parties through the intermediary of the Secretary-General of the United Nations. The American and European Conventions on Human Rights contain similar provisions, obliging States Parties declaring such an emergency to notify the other States Parties through the intermediation of the Secretary-General of the Organization of American States or the Council of Europe, respectively. Recognition of a duty to inform other States Parties of the declaration of a state of emergency adversely affecting the enjoyment of fundamental human rights reflects the importance attributed to the taking of this exceptional measure. 17/ In addition, it recognizes, implicitly, the interest of the other States Parties in the state of emergency and its consequences for the enjoyment of human rights. Legitimizing the interest of States Parties in states of emergency declared by any other State Party, to the detriment of the principle of non-interference in the internal matters of sovereign States, is an element of a sort of ordre publique binding the States which make this commitment.

In 1985, after several years of deliberations, consultations with Governments and preliminary studies, the United Nations Economic and Social Council authorized the Sub-Commission of the Prevention of Discrimination and Protection of Minorities to appoint a Rapporteur to prepare an annual report on states of emergency, including a list of all States having proclaimed, extended or terminated a state of emergency. The appointment of this Rapporteur demonstrates the concern of the international community in general with states of emergency and their consequences for the enjoyment and exercise of fundamental human rights.

This guideline indicates that a State which declares a state of emergency should notify all pertinent international bodies, including the Secretary-General of the United Nations and the pertinent regional organizations, when the State declaring an emergency is party to one or more of the instruments mentioned above, and the United Nations Rapporteur on States of Emergency and Human Rights.

Part Two

6. Measures taken pursuant to a state of emergency

(a) The legislation concerning states of emergency should allow the competent authority to authorize, pursuant to a declaration of emergency, only such specific measures as are strictly required by the exigencies of the circumstances which have led to the declaration, subject to the other limitations indicated in these guidelines.

(b) In determining which measures shall be taken pursuant to a declaration of emergency, the competent authorities should be required to evaluate the foreseeable consequences of such measures on the enjoyment of fundamental rights and liberties recognized by the constitution, laws and international law of human rights, in order to identify and implement those

measures which will enable the authorities to respond efficiently to the danger motivating the declaration of emergency while having the least possible impact on fundamental rights. The results of such evaluation shall be made public.

(c) When an emergency affects the enjoyment of fundamental rights recognized by the constitution or international law in force, administrative or legal measures designed to compensate or minimize the adverse consequences of the state of emergency on the enjoyment of such rights should be taken whenever possible.

Commentary

Paragraph (a) recognizes the right of the competent authorities to authorize measures which are "strictly required by the exigencies of the circumstances which have led to the declaration ...", reiterating the requirement common to article 4.1 of the International Covenant on Civil and Political Rights, 27.1 of the American Convention on Human Rights and 15.1 of the European Convention on Human Rights. The principle of necessity thus comes into play at two levels. First, for the declaration of emergency itself to be justified, "ordinary measures" must be inadequate, i.e. emergency measures must be necessary. 18/ Secondly, specific emergency measures are only valid to the extent they are "strictly required" by the exigencies of the situation. Recognition of the need for a state of emergency in no way obviates the need for careful scrutiny of the need for the specific emergency measures to be adopted, which must be carefully tailored not to exceed what is actually required to defuse the emergency and open the way to a return to normalcy.

The reports prepared by the United Nations Rapporteurs on States of Emergency refer to the latter as the "principle of proportionality" 19/, while the former is subsumed in the requirement that the threat to the life of the nation must be "exceptional". 20/ Strictly interpreted, the requirement that the specific measures adopted be "strictly required" subsumes the principle of proportionality as known in domestic law, and goes further. While a measure which is disproportionate is per force not necessary, a measure which meets the test of proportionality is not necessarily "strictly required". As the jurisprudence of the European human rights system indicates, the test of strict necessity of a measure is whether or not other measures having a lesser impact on fundamental human rights would have been sufficient to meet the same end. 21/

The final clause of paragraph (a) provides a reminder that necessity alone does not legitimate the imposition of emergency measures, but that other requirements, substantive as well as procedural in nature, also must be satisfied.

Paragraph (b) provides a procedural framework for determining whether the requirements of proportionality and necessity are satisfied, suggesting that the legislation should expressly recognize the duty of the competent authorities to evaluate the necessity of the measures contemplated in the sense indicated in the commentary to paragraph (a). It is evident that such evaluation should form part of the initial decision as to the specific

measures which are authorized. However, the text does not refer to prior or even to periodic evaluation because, given the exceptional and temporary nature of all emergency measures, evaluation of the necessity of the measures in place should be ongoing. 22/ The provision that the results of this process should be made public is intended, on the one hand, to facilitate review by the competent legislative or other organs of control and, on the other, to respect the right of the public to know and understand the reasons for the exceptional restrictions on the enjoyment of their fundamental rights.

Paragraph (c) suggests a further aspect of the principle of proportionality which should be incorporated into national law. If the overriding imperative of the Government during a state of emergency is to ensure that the measures adopted in order to control the situation have the least possible impact on fundamental rights, it does not suffice to select the measures on the basis of their probable impact; it is also necessary to identify and implement safeguards designed to further reduce the impact of emergency measures on the enjoyment of human rights, or the risk of abuses which emergency measures often entail. This duty has been recognized as part of the principle of proportionality in the European human rights system. 23/

7. Rights and liberties which may not be affected by emergency measures

The legislation should indicate that nothing done pursuant to a state of emergency may be incompatible with enjoyment of the following:

(a) the right of peoples to self-determination, including the right to determine the system of government and to elect public officials in free and periodic elections and the right not to be subject to practices constituting genocide under international law;

(b) the right to life, personal integrity and the right of every person deprived of liberty to humane treatment and not to be subject to forced labour;

(c) freedom of thought, conscience and religion, the right to legal personality and nationality and the right to the equal protection of the law against discrimination on grounds of race, colour, sex, language, religion, opinion, social origin or other status;

(d) the right of persons accused of an offence not to be subject to retroactive application of criminal law, except for law more favourable to the accused or convicted person, and to a fair trial before a competent, independent and impartial court, including:

(i) the right to be presumed innocent and the right not to be obliged to testify or give evidence against oneself or to confess guilt;

(ii) the right to be informed of the charges promptly and in detail, in a language which he or she understands;

(iii) the right to defend oneself in person or through counsel of his or her choice, including the right of indigent defendants to free legal assistance;

(iv) the right to have adequate time and facilities for the preparation of a defence, including the right to communicate with counsel in confidence and the right to an interpreter, if needed;

(v) the right to be present at trial, to examine or have examined prosecution witnesses, to give evidence and to present witnesses for the defence;

(vi) the right to appeal, if convicted, and the right not to be charged more than once for the same offence;

(vii) in no case shall a sentence of death be carried out during a state of emergency with regard to any person convicted of an offence on the basis of charges related to the emergency, or whose sentence has been imposed or reviewed by proceedings in which constitutional or legal safeguards have not been fully applied due to the exigencies of the emergency.

(e) the right of the child and the family to special protection, including the right of children to be among the first to receive protection and relief, the right of the family to privacy and unit, and the right of juveniles accused of an offence to be tried under procedures especially intended for persons of their age;

(f) rights recognized by international humanitarian law.

Commentary

International law recognizes that there are certain rights which should never be affected by a state of emergency. This is recognized in various ways. The International Covenant on Civil and Political Rights lists, in article 4.2, certain articles which are exempt from the prerogative of States parties to derogate from their obligations under the Convention during a state of emergency. The American and the European Conventions on Human Rights do the same, the American Convention according this status to a more extensive list of rights and the European Convention, adopted more than a decade earlier, having a similar but less extensive list. 24/ Independently of the rights accorded this special status by human rights treaties, norms which have the status of jus cogens are binding on all States, and the obligation to respect them transcends treaty provisions concerning derogation. 25/

In addition, certain rights may be non-derogable by virtue of their relationship to other rights, or by the operation of the general principles governing derogation, even though they do not appear in the list of rights expressly accorded this status. For example, if the derogation from a given right would cause violations of another right which is non-derogable, derogation of the former cannot be permitted, regardless of whether or not it appears in the list of non-derogable rights. 26/ Similarly, if it would be

impossible to justify the derogation of a given provision of the International Covenant on Civil and Political Rights in terms of the requirement of strict necessity, this provision should be considered non-derogable even though it may not appear in the list set forth in article 4.2.

Since the drafting of the International Covenant on Civil and Political Rights and the American Convention on Human Rights in the late 1960s, and especially since their entry into force in the late 1970s and the expansion of international monitoring bodies in the 1980s, considerable progress has been made exploring the question of the "other" rights which should not be derogated from during states of emergency. Guideline 7 suggests other fundamental rights which should be classified as non-derogable by national law. It is based largely on the experience, observations and decisions of judicial and quasi-judicial monitoring bodies, as well as that of the United Nations Rapporteur on States of Emergency and Human Rights and other United Nations Rapporteurs and Working Groups whose mandate covers non-derogable rights. 27/

Paragraph (a) refers to the rights of peoples and of national, ethnic, racial or religious minorities, including the right of peoples to self-determination, the right of peoples and minorities not to be subject to "practices constituting genocide". The prohibition of genocide is a norm of jus cogens, therefore not subject to derogation. 28/ In addition to systematic killing, the practices which may constitute genocide include inflicting "serious bodily or mental harm" on members of a people or minority group, inflicting living conditions "calculated to bring about its' physical destruction", the prevention of reproduction and the forcible transfer of children. 29/

The right to self-determination, which includes the right of each people to "freely determine their political status ... freely pursue their economic, social and cultural development [and] ... freely dispose of their natural wealth and resources. "Recognized by Common Article 1 of the International Covenants on Human Rights as well as Declarations adopted by the General Assembly, 30/ the right to self-determination is among those human rights which should probably be considered jus cogens. 31/

Paragraph (a) suggests that national law concerning states of emergency should not allow the election of public officials in free and periodic elections, the preferred method for exercising the "internal" dimension is the right of self-determination, 32/ to be denied by reason of a state of emergency. This is compulsory for the States parties to the American Convention which expressly recognizes the non-derogable nature of the right to participate in elections. A resolution of the Inter-American Commission on Human Rights suggests that the reason for conferring this status is that allowing the electoral process to be affected by a states of emergency would be incompatible with the "system of representative democratic government". 33/ This principle is not limited to the Inter-American system, since the Universal Declaration of Human Rights also recognizes, in article 29, the principle that "In the exercise of his (sic) rights and freedoms" no one shall be subject to restrictions which are incompatible with the "just requirements of morality, public order and the general welfare in a democratic society" (emphasis added).

It should be noted that this paragraph does not provide that elections should be celebrated during a state of emergency, which may have such consequences on rights such as freedom of expression, assembly, association or personal liberty as to deprive the elections of their essential purpose and character as a means of allowing the people to freely exercise their right to democratic self-government. Paragraph (a) states the principle that states of emergency should not be allowed to override this right, leaving to the national legislator the responsibility for identifying the most appropriate ways and means for guaranteeing effective recognition of this right even in the event of a possible emergency situation.

The rights to life and personal integrity, enumerated in paragraph (b) are foremost among the rights classified as non-derogable by all international instruments which recognize this category. The right of persons deprived of liberty to humane treatment is included in this paragraph because it is intimately linked to the prohibition of torture. The jurisprudence of both the United Nations and European human rights systems tend to view inhumane treatment as being part of a continuum with torture. 34/ While the detention of prisoners during an emergency might possibly require detention in conditions which would be considered sub-standard in normal times, the prohibition of inhumane treatment would seem to be a flexible enough standard to be met even in such circumstances. Given the increased risk of deliberate mistreatment and torture of prisoners during emergencies, suggesting that the right of prisoners to humane treatment need not be respected would be in direct contradiction with the obligation of a Government employing emergency measures to take all possible steps to increase and reinforce safeguards against the risk of violation of non-derogable rights.

Paragraph (b) also suggests that forced labour be prohibited by national law even during a state of emergency. This is compulsory for States parties to the American Convention, which includes it among the rights classified as non-derogable. The possible legitimate needs for using forced labour during an emergency are adequately covered by the exceptions expressly recognized by articles 8 and 4 of the International Convenant on Civil and Political Rights and European Convention on Human Rights, that is, compulsory military service and services required in order to confront a natural calamity or other emergency. Indicating that other forms of forced labour might be permitted during an emergency might open the door to use of forced labour as a form of aggravated punishment of prisoners or detainees, a practice which would be incompatible with the principle of proportionality and necessity.

Freedom of thought, conscience and religion, the right to legal personality and the prohibition of certain forms of discrimination, included in paragraph (c), are classified as non-derogable by both the International Covenant on Civil and Political Rights and the American Convention on Human Rights. The American Convention also includes the right to nationality in this category. It is suggested that the legislation of all countries should include the right to nationality among those which cannot be derogated from during a state of emergency, since the authorization of emergency measures incompatible with this right would appear to be incompatible with the principle of temporality as well as that of proportionality and necessity. 35/

Paragraph (c) suggests that the legislation should not allow emergency measures which discriminate on the basis of opinion. Although international instruments do not specifically prohibit discrimination on this ground in regard to emergency measures, the damage to the enjoyment of human rights which would result from discrimination on the grounds of political or other opinion would far outweigh any possible legitimate need for measures discriminating on this ground.

Paragraph (d) suggests that national legislation should preclude the possibility of derogation of most of the due process rights of persons accused of an offence during a state of emergency, even though the right not to be subject to retroactive application of penal law is the only such right classified as non-derogable by international treaties. 36/ Two reasons support this suggestion: the lack of any proven need for derogation from these guarantees, on the one hand, and the consequences which trial without full respect for them entails for the defendant, on the other. 37/ Common Article 3 of the Geneva Conventions, considered by many to represent jus cogens, provides that "the following acts are and shall remain prohibited at any time and in any place whatsoever ... (d) the passing of sentences without previous judgement pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples". 38/ While the 1949 Conventions do not identify these "essential judicial guarantees", Protocol II to the Conventions specifies a series of procedural rights which must be fully respected during non-international armed conflicts. 39/ The guarantees enumerated in articles 6.2 and 6.3 of Protocol II are substantially identical to those referred to in paragraph (d) of this guideline.

The due process rights not included in this list proposed by Guildline 7 are the right to be tried without undue delay, the right to a public trial, the right to cross-examine witnesses and to present witness on the same basis as the prosecution. The possibility of derogation from these rights is not excluded a priori because of cases considered by international bodies which suggest that in certain circumstances there may be a legitimate need for holding criminal trials under special procedures which do not fully respect these specific rights. 40/

Nevertheless, it should be emphasized that in most circumstances the only right which should be affected is the right to a prompt trial. Given the presumption that states of emergency should be of relatively short duration, if the exigencies of the emergency make it difficult to try certain suspects under normal procedures, the solution which usually will have the least possible impact on their rights is to postpone the trial until it can be conducted with full respect for all guarantees of due process.

The same reasoning a fortiori supports the conclusion that, in countries where the death penalty has not been abolished, no death sentences related to the emergency should be carried out until the end of the emergency permits review in full compliance with all procedural guarantees and without the emotions and pressures which are inevitably generated by emergency situations, and which create a risk of unfairness even under normal proceedings. 41/

Paragraph (e) suggests that the legislation should not allow the right of the child and the family to special protection to be derogated from during a state of emergency. This is mandatory for States parties to the American Convention, which classifies these rights as non-derogable. The reason for this suggestion is the lack of any demonstrated necessity for emergency measures adversely affecting these rights in the experience of the competent international bodies which have had occasion to examine states of emergency. Reference is made, by way of example, to some of the rights of children which are more likely to be affected by states of emergency. Obliging children to give information concerning the whereabouts or activities of family members is an example of a practice incompatible with the right to privacy which is not justified in any circumstances, including a state of emergency. The various rights concerning family unity recognized by international law and the right of family members to be informed of each others whereabouts when separation has occurred, are other examples of rights which may assume special importance during a state of emergency.

The most comprehensive definition of such rights is found in the Convention on the Rights of the Child. 42/ It should be noted that the rights recognized by this instrument are often, as the examples indicated above suggest, rights which are shared by the child and other members of his/her family, and that the Convention has no provisions permitting derogation during states of emergency. 43/

Paragraph (f) indicates that states of emergencies do not justify non-compliance with the obligation to respect international humanitarian law. This paragraph also reflects the principle that the provisions of international human rights treaties which allow non-compliance with certain of their provisions during a state of emergency do not justify non-compliance with other obligations under international law. This general principle applies a fortiori to international humanitarian law, a body of law specifically designed to apply to armed conflicts, the most extreme type of threat to the life of the nation. While most of international humanitarian law is applicable only to certain "categories of persons involved in certain types of armed conflicts", "Common article 3" of the Geneva Conventions is applicable to members of the civilian population during situations of internal conflict. 44/

8. The rights of persons deprived of liberty

Without prejudice to the principles set forth in other guidelines, in particular 7 and 9, the legislation should provide that nothing done pursuant to a state of emergency may affect the following rights:

(a) No person deprived of liberty for whatever reason shall be denied of the following:

(i) the right to be informed of the reasons for detention promptly and in writing, in a language which he or she understands;

(ii) the right to have his or her family informed of the detention without delay, and to receive visits;

(iii) the right of prompt and regular access to a lawyer of his or her choice;

(iv) the right to challenge the legality of the deprivation of liberty before a court of law by habeas corpus or other prompt and effective remedy.

(b) If the exigencies of the emergency are such that the detention of persons not accused of an offence is strictly necessary:

(i) deprivation of liberty may only be authorized by a special authority established for this purpose, which shall be impartial and independent from any other public authority;

(ii) no person shall be detained without charge for longer than strictly necessary;

(iii) persons detained without charge pursuant to measures authorized by the declaration of emergency shall be detained separately from prisoners charged or convicted of an offence, in circumstances which take fully into account their status, and shall not be obliged to perform work nor to participate in rehabilitation programmes;

(iv) all possible measures shall be taken to protect the family of the detainee from the adverse consequences of detention.

Commentary

This guideline contains two paragraphs, one pertaining to the rights of every person deprived of liberty, regardless of the grounds or legal basis for the detention, and a second pertaining to persons detained without being charged with a crime. An introductory sentence provides a reminder that this guideline is without prejudice to those concerning the rights of persons accused of a crime to due process, nor those concerning the competence of the judiciary during a state of emergency.

Paragraph (a) indicates that the family of every person deprived of liberty shall be informed of the detention without delay, and that the person deprived of liberty shall have the right to receive visits from members of his or her family. This provision reflects, on the one hand, the right of the family to be informed of the whereabouts of a person deprived of liberty. The Human Rights Committee has indicated that, in extreme cases, denial of this right can constitute mental torture of relatives deprived of this information. 45/ On the other hand, recognition of the right of a prisoner to receive visits from his or her family and lawyer is the most appropriate way of precluding incommunicado detention, which is widely recognized as fostering torture and mistreatment of prisoners. 46/

The right of every person deprived of liberty to challenge the legality of the deprivation before the courts has been recognized as non-derogable by the Inter-American Court of Human Rights, on the grounds that it is indispensable for the protection of non-derogable rights of the prisoner and

to ensure that the deprivation of liberty is compatible with the declaration of emergency and measures authorized pursuant to the declaration. 47/ The right to be informed in writing of the reasons for the detention - which means that the decision authorizing it must be a reasoned one - and the right to have prompt and regular contact with a lawyer of his or her choice are necessary to enable the prisoner to exercise the right to challenge the legality of detention. 48/

Paragraph (b) sets forth special guarantees applicable to persons detained without criminal charge, if the exigencies of the emergency should make such detention necessary. It should be emphasized that establishing legal safeguards applicable to persons detained without charge does not imply that such detention should be accepted as a normal consequence of a state of emergency; in most cases the exigencies of an emergency do not require the detention of persons without there being evidence that they have committed a crime, and without providing them with an opportunity to contest the charges. However, in exceptional circumstances detention without charge, particularly for short periods, may be a lesser infringement of the rights of the person than holding trial under procedures not providing full protection for due process guarantees or indefinite extension of pre-trial detention. 49/

Subparagraph (i) indicates that the power to detain without charge should only be exercised by "a special authority established for this purpose, which shall be impartial and independent from any other public authority". If exceptional circumstances requiring detention without charge do arise, all possible steps must be taken to ensure that this power is not exercised in an arbitrary fashion. One critical safeguard would be to entrust this power to a body which can judge the evidence on the need for detention presented to it in individual cases with independence and impartiality. In no case should this extraordinary power be entrusted to authorities such as the police or other security forces. 50/

Subparagraph (ii) reiterates the implication of the principle of necessity and proportionality for this particular emergency measure, i.e. that it must be lifted, both in general and in each individual case, as soon as the need diminishes. Since persons detained without charge are presumed innocent of any crime, they should be given the most favourable conditions of detention possible and exempt from any requirements or programmes intended as punishment or rehabilitation. Some specific implications of this principle are set forth in subparagraph (iii). Given the adverse emotional, economic and other consequences of detention on the family of the detainee, subparagraph (iv) suggests that if the national law recognizes the possibility of detention without charge as an emergency measure, it should also recognize the duty of a Government to take preventive and compensatory measures to reduce the hardship caused by the separation of the detainee from his or her dependants.

9. Effects of a state of emergency on the judiciary

(a) The legislation should provide that nothing done pursuant to a state of emergency should diminish the jurisdiction of the courts:

(i) to review the compatibility of a declaration of emergency with the law, the Constitution and obligations arising under international law, and to declare the declaration illegal or unconstitutional in the event of incompatibility;

(ii) to review the compatibility of any action taken by a public authority with the terms of a declaration of emergency;

(iii) over legal actions to enforce or protect any rights recognized by the Constitution, national and international law whose effectiveness is not affected by the declaration of emergency;

(iv) over criminal matters, including offences related to the emergency.

(b) The legislation should provide that nothing done pursuant to a state of emergency should diminish the provisions of the Constitution and laws concerning the appointment, terms of office or privileges and immunities of members of the judiciary, nor the independence and impartiality of the judicial branch.

Commentary

This guideline has two paragraphs, one providing that states of emergency should not be used to undermine the independence of the judiciary, and another limiting the consequences of states of emergency on the competence of the courts. Together they are intended to preserve the role of the judicial branch as principal guarantor of legality, which is essential to ensure that the Rule of Law prevails during a state of emergency. 51/

Paragraph (a)(i) provides that emergency measures may not be used to deprive the courts of competence to review the compatibility of a declaration of emergency with the legislation concerning states of emergncy and, in legal systems where the courts have such functions, with the Constitution and "obligations under international law". The term "obligations under international law" refers to the provisions of human rights treaties concerning derogation, such as article 4 of the International Covenant on Civil and Political Rights or equivalent provisions of the American and European Convention on Human Rights, as well as customary international law concerning human rights.

Similarly, subparagraph (ii) provides that emergency measures may not affect the competence of the courts over the compatibility of actions taken pursuant to a state of emergency with the declaration of emergency, and subparagraph (iii) provides that they may not affect the competence of the courts over actions seeking protection of rights which remain in force during

the state of emergency. 52/ The limitations of the effects of emergency measures established in these three subparagraphs are needed to ensure that the Executive does not become a law unto itself, interpreting and applying emergency measures without any control. They are also consonant with the principle of necessity and proportionality, for while it may become necessary to take certain measures restricting the exercise or enjoyment of certain rights and freedoms, there can be no necessity for taking the additional step of depriving the judiciary of the ability to ensure that the Executive has not exceeded its discretion in determining which measures to take, that public servants do not take measures beyond those the Executive has decided are necessary, or to deprive the public of the right to seek protection for rights which it has not been necessary to derogate from. On the contrary, restricting the enjoyment of certain basic rights enhances the need for effective safeguards to ensure that such restrictions are not exceeded.

Subparagraph (iv) suggests that legislation should not permit the courts to be deprived of exclusive competence over criminal matters during states of emergency. This reflects Principle 5 of the Basic Principles on the Independence of the Judiciary, which provides that:

> Everyone shall have the right to be tried by ordinary courts or tribunals using established legal procedures. Tribunals that do not use the duly established procedures of legal process shall not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals. 53/

It also reflects the accumulated experience of competent international bodies that transferring criminal competence from ordinary courts, which are independent and impartial, to special or military courts, has consequences which are difficult to control and tend to go far beyond those which are formally recognized. When competence over security offences committed by civilians is transferred to special courts, for example, theoretically the only rights affected may be certain procedural guarantees, but in practice the lack of such guarantees, together with the dependence and partiality of the tribunal, too often cumulates in denial of the elemental right to a fair trial, and even tolerance of violations of non-derogable rights, such as the use of torture. 54/ Similarly, when emergency measures are used to deprive independent and impartial courts of competence over officials charged with violations of human rights, experience demonstrates that removal of this vital safeguard in effect creates a climate of impunity which encourages widespread and indiscriminate violations of human rights, including non-derogable rights. 55/

10. Effects of a state of emergency on the legislature

(a) The legislation should provide that the national legislature may not be dissolved during a state of emergency, nor may any other authority assume legislative functions by reason of the state of emergency.

(b) The legislation should provide that members of the national legislature shall enjoy the privileges and immunities necessary for exercise of their mandate.

Commentary

This provision is intended to prevent the Executive from usurping the role of the legislature during a state of emergency. The transfer of the law-making function to the same branch or organ of government responsible for enforcement of the law goes far beyond the type of temporary, limited modification of the legal order which are compatible with the principle of proportionality and necessity. In addition, given the role of the legislature in most States as the branch of government which most directly represents the people or peoples which make up the nation, 56/ elimination of the legislature or denial of its essential function may adversely affect enjoyment and exercise of the right to self-determination. Depending on the composition of the society and structure of State in question, this may also apply to interference by the national government in the functions of elected regional legislatures or governments. 57/

This provision is not intended to preclude the delegation of certain legislative functions to the Executive by the legislature, nor dissolution of the legislature when this is the normal procedure for convening elections.

Paragraph (b) is intended to prevent interference with the functioning of the legislature indirectly through measures directed against individual members, such as detention or suspension of their mandate. It should be noted that this paragraph does not provide that members of the legislature should have complete immunity from emergency measures because of their status, but only that they shall enjoy those privileges and immunities which are necessary for the exercise of their mandate. What these privileges and immunities are should be defined by national law.

Part Three

11. Restoration of rights and compensation

The legislation should provide that, when a state of emergency has terminated, all possible efforts should be made to restore those whose rights have been adversely affected by measures taken pursuant to the emergency to full enjoyment of their rights and, when appropriate, to compensate them for injuries suffered and to provide such rehabilitation as may be necessary. In particular:

(a) that all persons detained without charge be released without delay, and provided with any necessary assistance in reintegration into their homes, employment and community.

(b) that any sentences imposed by judicial proceedings in which constitutional or legal safeguards were not fully applied due to the exigencies of the emergency be reviewed promptly with a view to determining whether the interests of fairness might require reopening of the judgement, pardon or retrial.

Commentary

Part Three of the guidelines concerns the consequences of emergency measures once the state of emergency has terminated.

Article 11 is intended to clarify some of the implications of the principle of temporality. The first sentence provides in general terms that once the situation which justified the declaration of emergency has been eliminated, or brought under control to the extent that emergency measures are no longer necessary, the Government is obliged not only to lift the state of emergency and terminate all emergency measures, but also to take all possible measures to help those affected by the emergency to return to the status quo ante.

The two subparagraphs refer to the consequences of two emergency measures which were particularly important because they affect personal liberty, i.e. prisoners detained without charge and those sentenced during the emergency without full compliance with due process. If national law admits the possibility of application of either measure during a state of emergency, subject to the principle of necessity and proportionality, it may be advisable to include in the law provisions indicating expressly how the persons affected should be treated upon the termination of the emergency in order to ensure that such measures do not have consequences exceeding those which are strictly necessary.

Thus subparagraph (a) suggests that the legislation should explicitly provide that any prisoners held without charge pursuant to an emergency measure should be released without delay and provided with any necessary aid in overcoming any continuing consequences of such detention. This is self-evident, given their status as persons neither convicted nor accused of any offence.

If the legislation on emergencies provides for trial by special courts or under special procedures, the circumstances of all prisoners convicted under such legislation should be reviewed as soon as possible after termination of the state of emergency in order to determine the appropriate response. If there is sufficient evidence of the commission of an offence, it may be necessary to provide a new trial with full respect for due process. If doubt exists as to the sufficiency of the evidence used to obtain the conviction, or whether or not it was obtained by illegal means, or if the motives of the crime or the need for national reconciliation so dictate, pardon or reduction or commutation of the sentence may be the appropriate response. In any event, it is essential to review the cases of all persons serving sentences under conditions which would not have been legal except for the state of emergency at the earliest possible opportunity, in order to avoid any continuing injustice. 58/

12. Prohibition of discrimination

The legislation should provide that no person should be subject to any form of discrimination by reason of his or her participation, or participation of relatives, in any event related to the state of emergency.

Commentary

In some countries, persons having been involved in events underlying the emergency, or suspected of involvement in such events, have been subject to discrimination even after a state of emergency has ended. For example, persons who participated in certain public demonstrations or work stoppages, who signed certain documents, who were subject to detention during the emergency, or who are identified as having participated in or supported a certain political or social movement may be discriminated against in matters such as employment, access to education, freedom of movement, the right to membership or to hold office in trade or professional organizations, or to exercise political rights. Such discrimination may also be extended to the spouse, children and other relatives of the person whose conduct or sympathies motivate it.

Any discrimination motivated by real or suspected involvement in events related to a state of emergency should be prohibited once the state of emergency is terminated. In some cases, such discrimination may constitute discrimination on the basis of "political or other belief", which is prohibited by articles 2 and 26 of the International Covenant on Civil and Political Rights, as well as article 2 of the International Covenant on Economic, Social and Cultural Rights, article 1 of the American Convention on Human Rights and article 14 of the European Convention on Human Rights. To the extent such discrimination is not, strictly speaking, based on belief, it should be considered discrimination based on "other status", which is also prohibited by each of the above-mentioned instruments.

This guideline is complementary to the prohibition of certain forms of discrimination during the state of emergency, and is not meant to imply that the kind of discrimination on these grounds would be acceptable during the emergency. However, the protection against discrimination called for by this guideline is more comprehensive than that required by article 7 (c) during the state of emergency, reflecting the difference between the types of discrimination prohibited by international human rights treaties in ordinary circumstances and during states of exception. 59/

13. Right to a remedy

The legislation should provide that nothing done pursuant to the declaration of emergency should restrict the right of a person who considers that he or she has suffered a violation of a legally recognized right during the state of emergency to seek redress before the courts once the emergency has ceased, and the right to a prompt decision on his or her claim.

Commentary

This guideline is complementary to guideline 9, which recommends that part of the competence of the courts should remain untouched during a state of emergency. Guideline 9 provides that emergency measures should not diminish the jurisdiction of the courts to review the legality of the declaration of emergency and the compatibility of the action taken by public officials with the terms of the declaration, nor their competence over actions to enforce or

protect rights not affected by the emergency. This allows a distinction to be made with regard to judicial enforcement and protection of rights during a state of emergency, according to the rights concerned. If the right is one which the state of emergency does not purport to affect, the right to take legal action for its protection or enforcement is unchanged. If, to the contrary, the right is one which is affected by the declaration of emergency, the scope of judicial review may be limited to two issues, that is, whether an action is compatible with the emergency measures contemplated by the declaration and whether the declaration itself, including the measures it authorizes, is legal.

It follows that, if the state of emergency authorizes measures which are incompatible with a given right, such as the right to employment or movement, and if the courts find that both the declaration of emergency and the measure which restricts such rights are per se valid, it may be impossible to seek a judicial remedy contesting the application of such emergency measures in individual cases during the emergency. In other words, if the competent authorities legitimately decide to take emergency measures affecting the enjoyment or exercise of a certain right, they may also - subject to the principle of necessity and proportionality and the other restrictions of derogation imposed by international law - decide to restrict judicial competence to consider allegations of violation of such rights. Indeed, if the effect of an emergency measure under national law is to "suspend" the enjoyment or exercise of one or more fundamental rights, this might automatically have the effect of sharply curtailing, if not eliminating altogether, the scope of judicial review of complaints alleging a violation of such right or rights. If this occurs, guideline 13 provides in effect that the suspension of judicial competence to consider actions alleging the violations of such rights should be temporary, so that those whose rights may have been injured may seek redress when the circumstances which justified the suspension of access to judicial remedy have ceased to exist. 60/

Notes

1/ The first United Nations Rapporteur on States of Emergency, Mme. N. Questiaux, gave the following examples of terms for states of emergency used in domestic law: state of emergency, state of siege, state of alert, state of prevention, state of internal law, suspension of guarantees, martial law and special powers. E/CN.4/Sub.2/1982/15, para. 22.

Chile provides an example of a country having a graduated series of states of emergencies each having specific, predetermined consequences. The Constitution of 1925 provided for a state of alert in case of external war and state of siege in time of external attack or internal disturbances. The only rights which could be affected by a state of siege were personal liberty, freedom of movement, freedom of assembly and freedom of the press. Under the unconstitutional government of General Pinochet, a decree law adopted by the ruling junta expanded this to four types of state of emergency: the state of internal or external war, state of alert, state of siege and extraordinary powers. Decree Law No. 640 of 10 September 1974, para. 6. Subsequently a "Constitutional Act" recognized four different states of emergency: the state of external or internal war, internal disturbances, latent subversion and

public calamity. Constitutional Act No. 4 of 13 September 1976. Each state of emergency had distinct causes and consequences, and two or more could be in effect simultaneously. These four states of emergency were later incorporated into the 1980 Constitution, which also contained transitory provisions giving the President wide discretionary powers for a perod of some seven years. Report on the Situation of Human Rights in Chile, Inter-American Commission on Human Rights, Washington, 1985, at 24-42.

2/ See for example, the case of Chile, where states of exception were used to provide a legal basis for an unconstitutional government, to justify usurpation of legislative powers by the Executive, to restrict the jurisdictions of the courts and to limit the enjoyment of fundamental rights to a far greater extent than permitted by the Constitution. Note 1, supra.

3/ The reference to "officially declared emergency" in art. 1 of the International Covenant on Civil and Political Rights was intended to ensure that recognition of the right to derogate from obligations under the Covenant could not be invoked to justify violation of Constitutional and domestic legal provisions concerning states of emergency. See the summary of the travaux préparatoires of the International Covenant on Civil and Political Rights prepared by the Secretary-General, A/2929 (1955), para. 41, cited in O'Donnell, Commentary to the Siracusa Principles (infra, Note 6) at 25-26.

4/ Many important human rights treaties do not provide for derogation, among them the International Covenant of Economic, Social and Cultural Rights, International Labour Conventions Nos. 29, 87, 98, 105 concerning Forced Labour and the Abolition of Forced Labour, Freedom of Association and the Right to Organize, the 1951 Convention on the Status of Refugees, the 1949 Geneva Conventions on International Humanitarian Law and Protocols thereto, the 1989 Convention on the Rights of the Child and the African Charter on Human Rights and the Rights of Peoples.

Art. 4 of the International Covenant on Civil and Political Rights provides (as do arts. 27 and 15 of the American and European Conventions) that the right to derogate from the provisions of the Convention does not imply the right to derogate from other obligations under international law, i.e. both customary law and treaty obligations. In 1978 the author suggested that the basic requirements of the above-mentioned human rights treaties concerning derogation "may well be considered to have universal validity." O'Donnell, "States of Exception," Review of the International Commission of Jurists, No. 21, December 1978, at 53. Subsequent developments, in particular the work of the United Nations Rapporteurs on states of emergency, would seem to confirm that they are in the process of becoming accepted as customary international law, although it was not possible to address this question in the preparation of these guidelines. If the treaty provisions concerning derogation do not have the force of customary international law, then presumably either the doctrine of the bodies responsible for monitoring compliance with each such instrument, or the standard rules of the laws of treaties concerning possible justification for non-compliance, in particular the rule of impossibility, would apply. This is, however, an area (among others) where standard rules of the law of treaties are ill-adapted to the

special nature and purposes of international human rights treaties. This is an issue which deserves further attention, in particular as it concerns human rights obligations under customary law.

5/ See the decision of the European Court of Human Rights in the "Lawless case" (merits), judgement of 1 July 1961, para. 28. Yearbook of the European Convention on Human Rights, 1961, at 472-474.

6/ The Siracusa Principles take a similar position, defining a threat to the life of the nation as one which "... threatens the physical integrity of the population, the political independence or territorial integrity of the State or the existence or basic functioning of institutions indispensable to ensure and protect the rights recognized in the [International] Convention [on Civil and Political Rights]." The Commentary to this Principle explains "Because not all social or public institutions are of critical importance to the life of the nation, and given that some disruption or obstruction of the operation of public institutions should be expected and tolerated in democratic societies, the wording 'existence or basic functioning of institutions indispensable for the protection' of fundamental rights is employed in order to emphasize that only the most serious disturbances of the public order qualify as threats to the life of the nation. Principle 39, Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights, adopted by an international meeting of experts held in Siracusa, Italy in 1984. Reprinted in Human Rights Quarterly, vol. 7, No. 1, February 1985, at 1-34.

7/ In the "Greek case" the European Commission of Human Rights posed the question whether or not "on 21 April 1967 there was a threat, imminent in that it would be realized before or soon after the May elections of such political instability and disorder that the life of the community could not be carried on." The "Greek case", decision of the European Commission, para. 164. Yearbook of the European Convention on Human Rights, vol. 12, 1969, at 75. This gives a useful guideline on what is to be understood by "imminence," that is, that which is likely to occur within a matter of weeks, at most. Similarly, in the Lawless case the European Commission considered the timing of the declaration of emergency appropriate because it was based in part on specific events expected to occur later the same month. Supra, Note 5, Report of the Commission, at 89-90.

8/ "The crisis or danger must be exceptional, in that the normal measures or restrictions, permitted by the Convention for the maintenance of public safety, health and order, are plainly inadequate." The "Greek case," Decision of the European Commission, para. 153, supra, Note 7, at 72.

9/ The Inter-American Court of Human Rights has emphasized that the state of emergency does not imply "temporary suspension of the rule of law, nor does it authorize those in power to act in disregard of the principle of legality by which they are bound at all times. When guarantees are suspended [i.e. when emergency measures are in effect, in the terminology of the Inter-American system] some legal restraints applicable to the acts of public authorities may differ from those in effect under normal conditions. These constraints can not be deemed to be non-existent, however, nor can the Government be deemed to have acquired absolute powers that go beyond the

circumstances justifying the grant of such exceptional legal measures. The Court has always noted, in this connection, that there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law." Advisory Opinion OC-8/87 of 30 January 1987, Habeas Corpus in Emergency Situations, para. 24. Annual Report of the Inter-American Court, 1987 at 13.

10/ The Inter-American Court of Human Rights has indicated that the measures authorized pursuant to a state of emergency "must be specified with precision in the decree promulgating the state of emergency" in order to facilitate judicial review of compliance with such limits during the emergency. Advisory Opinion OC-8/87 (supra, Note 9), para. 37.

11/ General comment 5/13 on art. 4 of the International Convention, Report of the Human Rights Committee, Official Records of the General Assembly, Thirty-sixth Session, Supplement No. 40 (A/36/40), annex VII.

12/ Explanatory paper presented by the second United Nations Rapporteur on states of emergency, Mr. L. Despouy, E/CN.4/Sub.2/1985/19, para. 22.

13/ See the commentary to guideline 2 (a), supra.

14/ The Constitution of Costa Rica provides an exception: the power to suspend certain provisions of the Constitution concerning human rights is given to the National Assembly in the first instance, and the President may exercise this prerogative only if the Assembly is not in session when the emergency arises. It further provides that "El decreto de suspensión de garantias equivale, ipso facto, a la convocatoria de la Asemblea a sessiones"; that the declaration of emergency requires a majority of two thirds and is valid for 30 days. Constitución Politica de la República de Costa Rica, Imprenta Nacional, Arts. 121 (7) and 140 (4).

15/ This is the case in Costa Rica, as indicated in Note 14.

16/ The effects of states of emergency on the legislature in general are addressed in guideline 10.

17/ See the summary of the travaux préparatoires of the International Convention prepared by the Secretary-General, A/2929, para. 47, cited in O'Donnell, Commentary to the Siracusa Principles, supra, Note 3, at 25-26.

18/ See the commentary to guideline 2 (a).

19/ Report of Mme. N. Questiaux, (supra, Note 1) paras. 60-63, and explanatory paper of Mr. Despouy (supra, Note 12), para. 22.

20/ See the decision of the European Commission of Human Rights in the Greek case, quoted in Note 8, supra.

21/ See, e.g. the decision of the European Court of Human Rights in the Lawless case, infra, Note 45.

22/ Ireland v. the United Kingdom, decision of the European Commission of Human Rights, European Court of Human Rights, Judgements and Decisions, Series B, at 125.

23/ See, e.g. Ireland v. the United Kingdom, decision of the European Commission of Human Rights, ibid. at 124.

24/ Art. 4.2 of the International Covenant on Civil and Political Rights lists the right to life (art. 6), to personal integrity (art. 7), to freedom from slavery and servitude (paras. 1 and 2 of art. 8), freedom from imprisonment for debt (art. 11), freedom from ex post facto application of criminal law, the right to legal personality (art. 16), and freedom of thought, conscience and religion (art. 18). The European Convention on Human Rights lists only four rights: the right to life, personal integrity, freedom from slavery and freedom from ex post facto application of criminal law (arts. 2, 3, 4.1 and 7); art. 27 of the American Convention on Human Rights lists all those rights classified as non-derogable by the International Convention, plus the right of the family and the child, the right to a name and nationality, and the right to participate in elections and hold public office (arts. 17, 18, 19, 20 and 23).

25/ See, e.g. the judgment of the International Court of Justice in the "Barcelona Traction case", Reports of the ICJ, 1970, paras. 33-34.

26/ Paragraph 2 of art. 27 of the American Convention on Human Rights contains a clause which expressly incorporates this principle into the Convention, in so far as "judicial guarantees" are concerned. In its Advisory Opinion of the scope of this clause the Inter-American Court indicated that it precludes derogation of the remedy of habeas corpus, amparo (a generic remedy for threatened violations of basic rights common to most Latin American legal systems), any other judicial remedy recognized by national law which is applicable to the rights recognized by the Convention as non-derogable, and any judicial remedy "necessary for the preservation of the rule of law." Advisory Opinion OC-9/87 of 6 October 1987, paras. 31-33, 38 and 40. 1988 Annual Report of the Inter-American Court of Human Rights. These remedies correspond to the rights recognized in arts. 7 (6) and 25 (1) of the Convention, which are not a priori classified as non-derogable. The Court also indicated that the due process guarantees referred to in art. 8.1 of the Convention must be fully applied with regard to the procedures mentioned above, even during a state of emergency. Ibid, para. 40. (See also Advisory Opinion OC-8/87, Note 10, supra.)

27/ Of particular relevance, among the United Nations bodies, whose mandates focus on non-derogable rights, are the Rapporteurs on torture and other cruel, inhuman and degrading treatment or punishment and on summary and arbitrary executions and the Working Group on Forced and Involuntary Disappearances.

28/ See the judgment of the International Court of Justice in the "Barcelona Traction case," supra, Note 25, para. 34.

29/ Convention on the Prevention and Punishment of Genocide, United Nations General Assembly resolution 260 A (III) of 9 December 1948, art. 3.

30/ Declaration on the Granting of Independence to Colonial Countries and Peoples, approved by United Nations General Assembly resolution 1514 (XV) of 3 December 1960, art. 2; Declaration on Principles of International Law concerning Friendly Cooperation among States, United Nations General Assembly resolution 2625 (XXV) of 24 October 1970, The principle of equal rights and self-determination of peoples.

31/ This is the position taken by the Special Rapporteur on the implementation of United Nations resolutions relating to the right of peoples under colonial and alien domination to self-determination, although the Special Rapporteur on the study of the historical and current development of the right to self-determination, on the basis of United Nations instruments expressed a more cautious view in this regard. E/CN.4/Sub.2/405/Rev.1 of 1981, para. 70 et seq; E/CN.4/Sub.2/404/Rev.1, para. 154.

32/ The right to participate in free and periodic elections based on universal suffrage is recognized as a critical element of the right to self-determination by the Special Rapporteur on the study of the historical and current development of the right to self-determination on the basis of United Nations instruments, supra, Note 3, para. 323.

33/ See the resolution concerning states of emergency adopted by the Inter-American Commission on Human Rights in April 1968, OEA/Ser.L/V/II.19 Doc. 32, 1968 Inter-American Yearbook on Human Rights, OAS, Washington, 1973, at 61.

34/ See, e.g. the decision of the Human Rights Committee in Solórzano v. Venezuela, No. 156/1983, paras. 10.2 and 11. Resolutions and Official Records of the General Assembly, Forty-first Session, Supplement No. 40 (A/41/40), annex VIII.C, in accordance with the Charter of the United Nations, as well as the General comment of the Committee on art. 7, which notes "For all persons deprived of their liberty, the prohibition of treatment contrary to article 7 is supplemented by the positive requirement of article 10 (1) of the Covenant that they shall be treated with humanity ..." General comment 7/16, para. 3. Official Records of the General Assembly, Thirty-seventh Session, Supplement No. 40 (A/37/40), annex V. For the jurisprudence of the European system see the decision of the European Court of Human Rights in Ireland v. the United Kingdom, judgement of 18 January 1978, supra, Note 22, paras. 162 and 167.

35/ The Inter-American Commission on Human Rights has condemned deprivation of nationality in the strongest possible terms, indicating that the right to nationality cannot be derogated even during a state of emergency, and that this is a customary norm of the Inter-American system which is applicable to all States whether or not they have ratified the American Convention. Situation of Human Rights in Chile, (supra, Note 1) at 157-8; Situation of Human Rights in Cuba, 1985, at 131.

36/ See Note 24, supra.

37/ An additional reason exists for considering that the right not to be compelled to confess or give self-incriminating evidence should never be derogated from, since the use of coerced confessions is widely recognized as an encouraging torture. See, e.g. General comment 7/16 of the Human Rights Committee, supra, Note 34; General comment 13/21, para. 14. Official Records of the General Assembly, Thirty-ninth Session, Supplement No. 40 (A/39/40), annex VI.

38/ Geneva Conventions I-IV of 12 August 1949, International Committee of the Red Cross, Geneva, 1983 (12th edition).

39/ Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts, Additional Protocols to the Geneva Conventions of 12 August 1949, International Committee of the Red Cross, Geneva, 1977.

40/ See, in particular, the decisions of the European Commission and Court in the Lawless and Northern Ireland cases. Notes 5, 22 and 34, supra.

41/ Art. 6 (2) of the International Covenant, which is not derogable, provides that the death penalty may not be imposed pursuant to laws or procedures "contrary to the provisions of [this] Covenant." Thus, as the United Nations Special Rapporteur on summary and arbitrary executions has indicated, "The term arbitrary in article 6 (1) of the Convention coupled with the provision in article 6 (1) that the sentence of death may not be imposed 'contrary to the provisions of [this] Covenant', can be interpreted to mean that the procedural safeguards of article 14 cannot be derogated from even during a public emergency in cases where a death penalty can be imposed." E/CN.4/1984/16, para. 59. Since the prohibition of arbitrarily executions is a norm of customary international law, the Special Rapporteur has adopted the practice of requesting all countries to comply with the guarantees of due process identified in art. 14 of the Convention, whether or not they are States parties.

42/ Approved by United Nations General Assembly resolution A/44/25 of 20 November 1989.

43/ See Note 4, supra, regarding the significance of absence of a provision allowing derogation in an international treaty.

44/ See Note 38, supra.

45/ Quinteros v. Uruguay, No. 107/1981, Official Records of the General Assembly, Thirty-eighth Session, Supplement No. 40 (A/38/40), annex XXII.

46/ See General comment 7/16 in which the Human Rights Committee recognizes allowing prisoners to receive visits from family members and lawyers as an effective safeguard against torture. Supra, Note 34, para. 1.

47/ Inter-American Court of Human Rights, Advisory Opinion OC-8/87 (supra, Note 9) paras. 37-40. The decision suggests that the remedy of habeas corpus must remain available during states of emergency in order to review the legality of the deprivation of liberty as applied to individual cases as well as to protect the life and personal integrity of the prisoner, although it is somewhat ambiguous as to whether the courts should necessarily retain competence to review the factual basis for the decision.

48/ The right of access to a lawyer is also a safeguard against torture, as indicated in Note 46, supra.

49/ The European Court of Human Rights considered the question of whether detention without charge or trial by special courts was the lesser evil in the Lawless case. Supra, Note 5. However, it reached this conclusion only after close scrutiny of the specific reasons for resorting to administrative detention and the likely impact of alternative means of accomplishing the same end (e.g. trial by special or military courts). Ibid, paras. 35-36, at 476. Detention without trial was considered to have less serious consequences due in large part to the guarantees surrounding the use of such detention, including the right to appeal, limited duration of the detention, the practice of freeing any prisoner willing to take an oath to abstain from illegal activities and legislative overview of the number of detainees and reasons for their detention. Ibid, para. 37, at 47. The jurisprudence of the European human rights system clearly indicates that the relative impact of such alternative emergency measures on the rights of those affected is not a question which can be answered in the abstract, but depends on all the circumstances of each case.

50/ Ordinary courts are the only bodies enjoying the adequate guarantees of independence and impartiality, but the courts presumably would not have competence to detain persons without charge, and it may be preferable that they do not become directly involved in applying emergency measures. The solution adopted in some countries has been to create one or more temporary special tribunals, which do not form part of the judicial branch but have as many characteristics of a court as are compatible with the exigencies of the emergency, in particular, impartiality and independence vis-à-vis the security authorities. In other countries the power to detain without charge is attributed to a high-ranking official of the executive, e.g. a minister. Either solution is preferable to decentralization of this power to detain to local authorities, or to military tribunals. Experience suggests such decentralization should be avoided at all cost, since the more decentralized the authority to detain, the greater the risk of arbitrariness and the progressive dilution of effective application of guarantees, culminating in violation of non-derogable rights, in particular torture, disappearance and death.

51/ The Inter-American Court of Human Rights has emphasized that any emergency measures which undermine the rule of law are inherently incompatible with the prerogative of derogation, whose essential purpose is to preserve the rule of law while permitting the Government to respond effectively to the threat to the life of the nation. See Advisory Opinions OC-8/87, para. 24, cited in Note 9, supra, and OC-9/87, para. 38, Note 26, supra.

52/ This is the position developed by the Inter-American Court in Advisory Opinions OC-8/87, paras. 37-40, cited in Note 9, supra, and OC-9/87, para. 38, Note 26, supra. This doctrine is not based exclusively on the "judicial guarantees" clause of the American Convention, but is also based on the concept of the state of emergency as an instrument for protecting the rule of law, as indicated in Note 47, supra. This gives the doctrine of the Court universal relevance.

53/ United Nations General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

54/ See, e.g. the decisions of the Human Rights Committee in Cariboni v. Uruguay, No. 159/1983, Herrera v. Colombia, No. 161/1983, and Peñarrietta et al. v. Bolivia, No. 176/1984 Official Records of the General Assembly, Forty-third Session, Supplement No. 40 (A/43/40), annex VII. A-C.

55/ See, e.g. the decision of the Human Rights Committee in Guerrero v. Colombia, No. 45/1979, Selected decisions adopted under the Optional Protocol, CCPR/C/OP/1 at 115.

56/ See the Commentary to guideline 4, supra.

57/ In many States having a federal form of government, states of emergency may be employed by the central government to dismiss or suspend the functioning of provincial or regional governments. Treaty provisions concerning derogation do not address this question, in part since human rights standards incorporated into international treaties focus almost exclusively on the rights of individuals, and in part because such treaties assume as little as possible about the structure of the State. Nevertheless, there is no doubt that regional or provincial governments are a form of self-government, and when such a government has the function of providing a people with a means of making decisions concerning their political status and economic, social and cultural development within the framework of a federal State, interference in the powers of functioning of such government may affect the rights of the people concerned to self-determination. This is a question which urgently needs further study.

58/ A distinction should be made between the duty to end and repair the consequences of emergency measures, which is inherent in the principle of temporality and of necessity and proportionality of emergency measures, and the right to compensation, which is based on the right of every person whose rights have been violated to a remedy. The right to pursue legal remedies after the termination of an emergency is addressed by guideline 13. The Human Rights Committee has indicated that correction of a wrong suffered during a state of emergency (e.g. release from prison, restitution of employment, etc.) does not extinguish the right of the victim to compensation. Betterretche v. Uruguay, No. 162/1983, paras. 10.5 and 11, Official Records of the General Assembly, Forty-fourth Session, Supplement No. 40 (A/44/40), annex X.A; Cariboni v. Uruguay, No. 159/1983, paras. 7 and 10, supra, Note 54.

59/ Compare art. 4 (1) of the International Covenant on Civil and Political Rights with arts. 2 (1) and 26 and compare art. 27 (1) with 1 of the American Convention. Art. 15 of the European Convention on Human Rights does not expressly prohibit discriminatory emergency measures. Nevertheless, the European Court of Human Rights examined allegations that emergency measures were applied in a discriminatory manner in Ireland v. the United Kingdom, concluding that no discrimination was proven. Supra, Note 34, paras. 225-232.

60/ The right to seek a remedy should a fortiori be recognized after the termination of a state of emergency if it has been denied during the emergency without justification. See the decisions of the Human Rights Committee cited in Note 58, supra.

Annex II

LIST OF REPLIES RECEIVED

A. Governments

Algeria	23 January 1991
Australia	4 June 1991
Bahamas	22 January 1991
Belgium	28 March 1991
Brunei Darussalam	4 April 1991
Burkina Faso	30 April 1991
Burundi	11 March and 7 May 1991
Byelorussian SSR	1 February 1991
Canada	18 March and 15 April 1991
Chad	5 February 1991
Chile	21 February 1991
Cuba	20 March 1991
Egypt	28 March 1991
Finland	21 March 1991
India	15 April 1991
Israel	28 May 1991
Myanmar	4 March 1991
Peru	12 March, 9, 22 and 24 April, 23 May, and 5 and 18 June 1991
Philippines	2 April 1991
Portugal	27 February 1991
Spain	16 January 1991
Sri Lanka	11 April 1991
Suriname	13 March 1991
Tunisia	23 May 1991
Turkey	15 February 1991
Uruguay	20 March 1991
Venezuela	7 December 1990

B. United Nations bodies

Centre for Social Development and Humanitarian Affairs (United Nations Office at Vienna)	7 January 1991
Special Committee against Apartheid	19 December 1990
Office of the United Nations Disaster Relief Coordinator	6 December 1990

C. Intergovernmental organizations

Council of Europe	11 January 1991
Inter-American Commission on Human Rights	6 March 1991
Organization of American States	18 December 1990

D. Non-governmental organizations

Amnesty International	22 February 1991
International Federation of Journalists	22 March 1991
International Institute of Humanitarian Law	7 January 1991
Inter-Parliamentary Union	21 December 1990

Annex III

LIST OF SPECIALIZED PUBLICATIONS RECEIVED

Amnesty International

"Chad: Political Prisoners Held in Secret - Calling the Government to Account" (AI Index: AFR 20/01/90)

"Chad: Cases of Political Prisoners Imprisoned in Secret" (AI Index: AFR 20/07/90)

"Mauritania: Human Rights Violations in the Senegal River Valley" (AI Index: AFR 38/10/90)

"Somalia: Report on an Amnesty International Visit and Current Human Rights Concerns" (AI Index: AFR 52/01/90)

"Sudan: Imprisonment of Prisoners of Conscience" (AI Index: AFR 54/06/90)

"Sudan: The Military Government's First Year in Power - A Permanent Human Rights Crisis" (AI Index: 54/10/90)

"Sudan: Health Workers and Human Rights" (AI Index: AFR 54/35/90)

"Colombia: Killings of Non-Combatant Civilians in Puerto Valdivia, Antioquia Department" (AI Index: AMR 23/29/90)

"Colombia: Human Rights Violations against Members of Indigenous Communities in Caldas Department in 1988" (AMR 23/61/90)

"El Salvador: Violations against Church Workers since the State of Siege" (AI Index: AMR 29/33/89)

"El Salvador: Violations against Church Workers: Update" (AI Index: AMR 29/09/90)

"El Salvador: Killings, Torture and 'Disappearances'" (AI Index: AMR 29/27/90 and AMR 29/27/90/s)

"Peru: Continuing Human Rights Violations 1989-1990" (AI Index: AMR 46/23/90)

"Venezuela: Reports of Arbitrary Killings and Torture: February/March 1989" (AI Index: AMR 53/02/90 and AMR 53/02/90/s)

"Bangladesh: Hundreds Detained Following State of Emergency" (AI Index: Weekly Update NWS 11/48/90)

"China: The Massacre of June 1989 and its Aftermath" (AI Index: ASA 17/09/90)

"People's Republic of China (Tibet Autonomous Region): One Year Under Martial Law: An Update on the Human Rights Situation" (AI Index: ASA 17/10/90)

"Tibet: Lifting of Martial Law" (AI Index: ASA 17/WU 01/90)

"Hong Kong: The Draft Bill of Rights Ordinance 1990: Memorandum from Amnesty International dated June 1990" (AI Index: ASA 19/04/90)

"India: 'Operation Bluebird': A Case Study of Torture and Extrajudicial Executions in Manipur" (AI Index: ASA 20/17/90)

"India: Summary of Amnesty International's Current Concerns" (AI Index: ASA 20/21/90)

"Malaysia: New Internal Security Act (ISA) Detainees" (AI Index: ASA 28/04/90)

"Myanmar: Prisoners of Conscience and Torture" (AI Index: ASA 16/04/90)

"Myanmar: Amnesty International Briefing" (AI Index: ASA 16/09/90)

"Myanmar: 'In the National Interest': Prisoners of Conscience, Torture, Summary Trials under Martial Law" (AI Index: ASA 16/10/90)

"Myanmar: Update on Human Rights Violations" (AI Index: ASA 16/39/90)

"Papua New Guinea: Torture and Unlawful Execution: Vincent Onari and Aloysius Minitong" (AI Index: ASA 34/02/90)

"Papua New Guinea: Human Rights Violations on Bougainville, 1989-1990" (AI Index: ASA 34/05/90)

"Sri Lanka: Summary of Human Rights Concerns" (AI Index: ASA 37/03/90)

"Sri Lanka: Emergency Regulation Withdrawn" (AI Index: ASA 37/WU 08/90)

"Sri Lanka: Emergency Regulations Regarding Post-Mortems and Inquests" (AI Index: ASA 37/05/90)

"Sri Lanka: Amnesty International Briefing" (AI Index: ASA 37/20/90)

"Sri Lanka: Extrajudicial Executions, 'Disappearances' and Torture, 1987 to 1990" (AI Index: ASA 37/21/90)

"Turkey: Extrajudicial Killings" (AI Index: EUR 44/45/90)

"Turkey: Continuing Violations of Human Rights" (AI Index: EUR 44/66/90)

"Turkey: Further Information on Continuing Violations of Human Rights" (AI Index: EUR 44/105/90)

"United Kingdom: Killings by Security Forces in Northern Ireland: Update" (AI Index: EUR 45/02/90)

"Yugoslavia: Amnesty International's Current Concerns" (AI Index: EUR 48/05/90)

"Egypt: Recent Human Rights Violations under the State of Emergency" (AI Index: MDE 12/07/90)

"Israel and the Occupied Territories: Administrative Detention Cases" (AI Index: MDE 15/24/90)

"Jordan: Releases of Prisoners and Review of Emergency Legislation" (AI Index: Weekly Update NWS 11/48/89)

"Jordan: Human Rights Protection After the State of Emergency" (AI Index: MDE 16/02/90)

Jaime Oraa

Human Rights in States of Emergency in Public International Law. Ph.D. thesis, University of Oxford Faculty of Law, January 1990.